(8)

No. 05-9222
Title: Lonnie Lee Burton, Petitioner
v.
Belinda Stewart, Superintendent, Stafford Creek Corrections Center
Docketed: February 15, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-35095)
Decision Date: July 28, 2005
Rehearing Denied: October 13, 2005
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 20 2005	Application (05A569) to extend the time to file a petition for a writ of certiorari from January 11, 2006 to February 10, 2006, submitted to Justice O'Connor.
Dec 28 2005	Application (05A569) granted by Justice O'Connor extending the time to file until February 10, 2006.
Feb 10 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 17, 2006)
Mar 1 2006	Waiver of right of respondent Douglas Waddington, Superintendent, Stafford Creek Corrections Center to respond filed.
Mar 23 2006	DISTRIBUTED for Conference of April 14, 2006.
Mar 27 2006	Response Requested . (Due April 26, 2006)
Apr 26 2006	Brief of respondent Douglas Waddington, Superintendent, Stafford Creek Corrections Center in opposition filed.
May 5 2006	Reply of petitioner Lonnie Lee Burton filed.
May 10 2006	DISTRIBUTED for Conference of May 25, 2006.
May 22 2006	DISTRIBUTED for Conference of May 25, 2006.
May 30 2006	DISTRIBUTED for Conference of June 1, 2006.
Jun 5 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 13 2006	Motion to appoint counsel filed by petitioner Lonnie Lee Burton.
Jun 15 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 21, 2006.
Jun 28 2006	Motion DISTRIBUTED for Conference of September 25, 2006.
Aug 8 2006	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 28, 2006.
Aug 14 2006	SET FOR ARGUMENT on Tuesday, November 7, 2006,
Aug 24 2006	Brief amicus curiae of Law Offices of Robert A. Ratliff filed.
Aug 28 2006	Brief amici curiae of National Association of Criminal Defense Lawyers, and The Washington Association of Criminal Defense Lawyers filed.
Aug 28 2006	Joint appendix filed.
Aug 28 2006	Brief of petitioner Lonnie Lee Burton filed.
Sep 13 2006	CIRCULATED.
Sep 20 2006	Record received from U.S.C.A. for the 9th Circuit.
Sep 20 2006	Record for U.S.D.C. for the Western District of Washington electronically Filed - no hard copy.

Oct 2 2006	Motion to appoint counsel filed by petitioner GRANTED. Jeffrey L. Fisher, Esquire, of Stanford, California is appointed to serve as counsel for the petitioner in this case.
Oct 2 2006	Brief amici curiae of Indiana, et al. filed. (Distributed)
Oct 2 2006	Brief amicus curiae of United States filed. (Distributed).
Oct 2 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Oct 2 2006	Brief of respondent Douglas Waddington, Superintendent, Stafford Creek Corrections Center filed. (Distributed)
Oct 12 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 27 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 30 2006	Reply of petitioner Lonnie Lee Burton filed. (Distributed)

No. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

LONNIE L. BURTON

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

ORIGINAL

Supreme Court, U.S.
FILED
FEB 10 2006
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Brian Tsuchida
Counsel of Record
Office of the Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle, WA 98101
(206) 553-1100

Counsel for Applicant

ORIGINAL

QUESTIONS PRESENTED

Mr. Burton was given an exceptional sentence of 258 months *above* the 305 month ceiling of the statutory sentencing range and this Washington State sentence became final after *Apprendi v. New Jersey*, but before *Blakely v. Washington*:

1. Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?
2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

LONNIE L. BURTON, PETITIONER,

v.

DOUG WADDINGTON, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Lonnie Burton petitions for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit was filed on July 28, 2005, and is attached at App. 1a. The Ninth Circuit denied Mr. Burton's Petition for Rehearing and Suggestion for Rehearing En Banc. This order is reproduced at App. 4a.

JURISDICTION

The Ninth Circuit issued its opinion on July 28, 2005. The Ninth Circuit denied Mr. Burton's Petition for Rehearing and Suggestion for Rehearing En Banc on October 13, 2005. On December 28, 2005, Justice O'Connor extended the time within which to file this petition for a writ of *certiorari* to and including February 10, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. On October 24, 1994, Mr. Burton was convicted of rape in the first degree (count I), robbery in the first degree (count II), and burglary in the first degree (count III).

When Mr. Burton was sentenced on March 13, 1998,[1] the sentencing court calculated the statutory standard range to be 234-304 months on the rape charge, 153 months to 195 months on the robbery charge, and 105-134 months on the burglary charge. Under Washington law, such sentences presumptively run concurrently. *See* Wash. Rev. Code § 9.94A.400 (1998). "Consecutive sentences [for these convictions] may only be imposed under the exceptional sentence provisions of RCW 9.94A.120 and 9.94A.390(2)(g) or any other provision of RCW 9.94A.390." *Id.*

In this case the sentencing court imposed an exceptional sentence 258 months *above* the 304 month maximum of the statutory standard range when it ordered that the standard range sentences for these offenses run consecutively. Specifically, the court imposed a prison term of 304 months on the rape charge, 153 months on the robbery charge, and 105 months on the burglary charge and then ordered that the prison terms run *consecutively*.[2]

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[1]This was Mr. Burton's third sentencing on these offenses. He was first sentenced on December 9, 1994, to an exceptional sentence of 562 months. He was resentenced in April 1995, with a lower offender score after an earlier conviction was overturned. At this second sentencing, the judge again imposed an exceptional sentence of 562 months. Mr. Burton appealed this second sentence and the Washington Court of Appeals ordered Mr. Burton be resentenced on grounds unrelated to those presented in this petition.

[2]The sentencing court also imposed an alternative exceptional sentence of 506 months on the rape conviction, 153 months on the robbery conviction and 105 months on the

In support of this upward departure from the statutory standard range, the court made the following findings pursuant to Wash. Rev. Code § 9.94A.390: (a) the "defendant's long criminal history, combined with the 'multiple offense policy,' results in a sentence that is clearly too lenient in light of the purposes of the Sentencing Reform Act"; (b) the defendant's actions amounted to "deliberate cruelty" to the victim; (c) the defendant's actions "demonstrate sophistication and planning of sort that makes the defendant a significantly different offender." Findings of Fact and Conclusions of Law Regarding Imposition of Exceptional Sentence at 8-10. Mr. Burton contested these findings.

2. Mr. Burton appealed his sentence to the Washington Court of Appeals. That court denied relief on July 17, 2000, more than one month after this Court's June 6, 2000 opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On December 5, 2000, the Washington Supreme Court denied Mr. Burton's request for review. Accordingly, Mr. Burton's appeal did not become final for retroactivity purposes until March 5, 2001. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

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burglary conviction. This alternative sentence was vacated by the Washington Court of Appeals for reasons unrelated to this petition.

3. Mr. Burton subsequently filed a Personal Restraint Petition challenging his exceptional sentence under *Apprendi v. New Jersey*. The Supreme Court of Washington denied relief, stating: "*Apprendi* does not apply to exceptional sentences that are otherwise within the statutory maximum for the crime." Ruling Denying Review, No. 72657-4 (July 16, 2002).

4. Mr. Burton filed a habeas petition in January 2002, arguing that his "sentence in excess of top of range set by statute violated due process when factors used to support it were not submitted to a jury and proven beyond a reasonable doubt." The district court denied Mr. Burton's petition.

5. Mr. Burton sought a certificate of appealability on his *Apprendi* claim. The Ninth Circuit initially denied this request, but the day after this Court's ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), the Ninth Circuit granted a certificate of appealability on the *Apprendi* claim. Mr. Burton argued that *Apprendi* compelled the conclusion that his exceptional sentence under Washington's Sentencing Reform Act was unconstitutional.

6. The Ninth Circuit affirmed the district court's denial of habeas relief. *See Burton v. Waddington*, 142 Fed. Appx. 297 (9th Cir. 2005), App. 1a. Relying on *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005) which addressed the identical issue a few weeks earlier, the Ninth Circuit held that *Blakely* "established a new rule that does not apply retroactively on collateral review." *Id.* at 299. Then, citing only pre-*Blakely* precedent

about the *non-statutory* Federal Sentencing Guidelines, the Ninth Circuit also held that "[b]ecause the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate *Apprendi*." *Id.* at 299-300. The Ninth Circuit did not explain why these cases compelled the same result under Washington's *statutory* sentencing scheme.

7. Mr. Burton's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on October 13, 2005.

REASONS FOR GRANTING THE PETITION

This Court has held that under the doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989), new procedural rules do not apply retroactively unless they fall into one of two exceptions. *See Beard v. Banks*, 542 U.S. 406, 411 (2004). The lower courts are divided over whether *Blakely* is a new rule. This Court should grant this petition and conclude that the holding in *Blakely* is not a new rule. If this Court decides *Blakely* is a new rule, it should address the important issue of whether *Blakely* applies retroactively and conclude that it does.

A. This Court Should Resolve the Split of Authority on Whether *Blakely* Is a New Rule.

1. The Courts Are Divided Over this Issue.

The Ninth Circuit has held that *Blakely* announced a new rule. *See Burton*, 142 Fed. Appx. at 299-300297, App. 3a; *Schardt*, 414 F.3d at 1032-35. The sole articulated rationale for the Ninth Circuit's conclusion is that "[e]very circuit court of appeals that

addressed the question presented in *Blakely* reached the opposite conclusion from the rule subsequently announced by the Supreme Court." *See Schardt*, 414 F.3d at 1035. In support of this statement, the Ninth Circuit relied *exclusively* on cases that addressed whether the *Apprendi* rule should be applied to the *non-statutory* Federal Sentencing Guidelines, not the *statutory* guidelines at issue in *Blakely* and Mr. Burton's case. *Id.*

One other federal circuit court has also held that *Blakely* announced a new rule. Addressing the application of *Blakely* to a petitioner sentenced under the Federal Sentencing Guidelines and whose sentence was final after *Apprendi* but before *Blakely*, the Tenth Circuit held that *Blakely* announced a new rule. *See United States v. Price*, 400 F.3d 844, 846-48 (10th Cir. 2005). The Tenth Circuit reasoned that before *Blakely*, the Tenth Circuit and other circuit courts held that *Apprendi* did not apply to judge-determined facts that resulted in a sentence below the statutory maximum and that it was not until *Blakely* that the "Supreme Court clarified that 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*'" *Id.* at 847 (quoting *Blakely*). The Tenth Circuit, like the Ninth Circuit, supports this reasoning by citing only cases involving the *non-statutory* Federal Sentencing Guidelines, not the *statutory* guidelines addressed in *Blakely*. *Id.* at 847.

In direct conflict with the Ninth and Tenth Circuits, the Tennessee Supreme Court held that *Blakely* is not a new rule. *See State v. Gomez*, 163 S.W.3d 632, 649-50 (Tenn.

2005). The Tennessee Supreme Court reasoned that the "language of *Booker* demonstrates that the United States Supreme Court does not regard *Blakely* as having announced a new rule of law." *Id.*

The Colorado Court of Appeals has also held that *Blakely* did not announce a new rule. *See State v. Johnson*, 121 P.3d 285, 286-87 (Colo. Ct. App. 2005). It concluded that *Blakely* simply "applied and explained a rule expressed in *Apprendi*." *Id.* at 286.

The conflict between these courts cannot be resolved without this Court's intervention. As the Tennessee Supreme Court noted, "Although some other courts and jurists have concluded that *Blakely* announced a new rule, the United States Supreme Court is the final arbiter of this issue." *Gomez*, 163 S.W.3d at 650.

2. The Decision Below Contravenes This Court's Precedent.

The Ninth Circuit's rejection of Mr. Burton's argument that the *holding* in *Blakely* is a "new rule" ignores this Court's analysis in both *Blakely* and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 which, while not expressly addressing the issue, make clear the holding in *Blakely* is not a new rule, and contravenes this Court's precedent on the definition of a new rule.

Straightforward application of *Apprendi* was all that was necessary to decide *Blakely*. *See* Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221, 252-55 (2005) (*Apprendi* "foreordained" the result in *Blakely*; "[a]ll the Court had to do to decide *Blakely* was to apply the rule exactly as *Apprendi* had stated it");

R. Craig Green, *Apprendi's Limits*, 39 U. Rich. L. Rev. 1155, 1169-82 (2005) ("the Court simply restated and applied *Apprendi*'s rule" in an "identical" manner).

Apprendi involved two statutorily established sentencing thresholds: one for committing the crime without racial motivation, and one for committing that class of crime with a racial motivation. This Court ruled that the "statutory maximum" was the maximum statutory sentence the defendant could receive "if punished according to the facts in the jury verdict alone." 530 U.S. at 483; *see also id.* at 469.

In *Blakely*, this Court again addressed the situation involving two statutorily established thresholds – one for committing the crime without exceptional circumstances, and one for committing that class of crime with exceptional circumstances – and using almost verbatim language from *Apprendi*, held that its "precedents make clear" that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. at 303. This Court continued: "The 'maximum sentence' is *no more* [the outer limit for the class of felony] here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) . . . ." 542 U.S. at 304.

Neither the *Blakely* majority nor any of the dissenters even hinted that holding in *Blakely* broke any new ground; the disagreement between the majority and the dissenters was on the merits of the *Apprendi* decision itself, not whether *Apprendi* dictated the result

in *Blakely*.[3] *Compare with Banks*, 542 U.S. at 415 (relying on the existence of dissenting opinions in *Mills v. Maryland*, 486 U.S. 367 (1988) to support argument that *Lockett v. Ohio*, 438 U.S. 586 (1978) did not compel the result in *Mills* where the very reason for the dissent in *Mills* was the argument that the *Lockett* principle did not compel the result in *Mills*).

To be sure, the *Blakely* decision startled many observers and has had a substantial impact on state sentencing systems. It rendered portions of Washington's and other states' determinate sentencing systems invalid. But the most that can be said of this outcome is, as Justice Breyer put it, that "[t]he Court [made] clear that it mean[t] what it said in *Apprendi*." *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting).

Making clear that a prior opinion meant what it said does not announce a new rule. The new rule must "break[] new ground" in some way necessary to its holding. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Because the holding in *Blakely* "was *dictated* by then-existing precedent" it was not a new rule. *Banks*, 542 U.S. at 413.

At the same time, one passage of *Blakely* went beyond the facts of the case. After applying *Apprendi*'s rule, this Court added: "When a judge inflicts punishment that the

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[3] *See, e.g., Blakely*, 542 U.S. at 306 ("Those who would reject *Apprendi* are resigned to one of two alternatives."); *id.* at 310 (rebutting argument "that *Apprendi* works to the detriment of criminal defendants who plead guilty"); *id.* at 311-12 (rebutting contention "that *Apprendi* is unfair to criminal defendants"); *id.* at 312 (rebutting argument "that *Apprendi* will attenuate the connection between 'real criminal conduct and real punishment'"); *id.* at 328 (Breyer, J., dissenting) ("the Court makes clear that it means what it said in *Apprendi*.").

jury's verdict does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 304. This alternate formulation of the *Apprendi* rule was significant because it suggested for the first time that the rule applied to binding sentencing thresholds *that are not statutes*, such as the Federal Sentencing Guidelines. Yet, as explained above, this passage was unnecessary to decide *Blakely* because both of the thresholds in that case, as in *Apprendi*, were statutes. *See* Stith, *supra*, at 255-57.

Subsequently, *United States v. Booker* extended the Sixth Amendment to cover all legally binding sentencing thresholds, not just statutory thresholds. And it did so with reasoning that confirms that *Blakely* was dictated by *Apprendi*. This Court reiterated its statement in *Blakely*, that "the requirements of the Sixth Amendment were *clear*" in *Blakely*. *See Booker*, 125 S. Ct. at 749 (emphasis added). It then acknowledged that, in contrast to *Blakely*, "the language used in our holding in *Apprendi*" does not cover the Federal Sentencing Guidelines, because the Guidelines' sentencing thresholds are not statutory. *Id.* at 753; *see also* R. Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 Geo. L.J. 395, 401 (2005) (*Booker* had to "br[eak] new ground" for this reason). This required the Court assess the general "principles [*Apprendi*] sought to vindicate." *Booker*, 125 S. Ct. at 753. After doing so, this Court held that the Sixth Amendment fact-finding requirements in *Apprendi* should apply "[r]egardless of whether the legal basis of the accusation is a statute or in

guidelines promulgated by an independent commission." *Id.*

The *Blakely* and *Booker* holdings are not the same. Mr. Burton is not asking this Court to address whether *Booker* announced a new rule. The only question Mr. Burton asks this Court to consider is whether the *holding* of *Blakely* is a new rule.

B. This Court Should Resolve the Important Issue of Whether *Blakely* Applies Retroactively If It Is a New Rule.

If *Blakely* is a new rule, its requirement that facts resulting in enhanced statutory maximums must be proved beyond a reasonable doubt applies retroactively to cases such as Mr. Burton's where sentences were based on contested facts proved only by a preponderance of the evidence. This Court has already held, in a combination of decisions, that rules related to the reasonable doubt standard apply retroactively. In addition, under the *Teague* test, reasonable doubt is a fundamental interest of transcending value necessary to the accuracy of criminal proceedings.

1. Through a Combination of Cases, This Court Has Already Made *Blakely* Retroactive.

In *Tyler v. Cain*, 533 U.S. 656, 666 (2001), this Court held that a new rule may be made retroactive through a series of Supreme Court cases. In concurrence, Justice O'Connor expounded:

> This Court instead may "ma[k]e" a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule.... [I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review.

Tyler, 533 U.S. at 668-69 (O'Connor, J., concurring). The rule in *Blakely* is precisely this type of rule.

This Court held that its decisions in *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) apply retroactively because of the role of the reasonable doubt standard in assuring that punishment is only inflicted on the guilty. *See Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977); *Ivan V. v. City of New York*, 407 U.S. 203, 204-05 (1972).

In *Ivan V.*, this Court gave the rule announced in *Winship* retroactive effect because "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." 407 U.S. at 205. Then, in *Hankerson*, the Court relied on *Ivan V.* to apply *Mullaney* retroactively because "the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.'" *Hankerson*, 432 U.S. at 242.

For the same reasons that *Ivan V.* controlled the retroactivity analysis in *Hankerson*, *Ivan V.* and *Hankerson* control the analysis here. *Blakely* is the precise example of a situation in which retroactivity is "necessarily dictate[d]" by an earlier decision of the Supreme Court. *Tyler*, 533 U.S. at 666.

2. If *Blakely* Announced a New Rule, Its Requirement of Proof Beyond a Reasonable Doubt is A Watershed Rule Of Constitutional Procedure That Should Be Applied Retroactively Under The *Teague* Rule On Retroactivity.

Under the second exception to the rule against the retroactive application of new constitutional rules, a rule applies retroactively "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" *See Teague*, 489 U.S. at 307. Such a rule vindicates two discrete concerns: the fundamental fairness of the underlying proceeding; and the accuracy of that underlying criminal proceeding. *See Saffle v. Parks*, 494 U.S. 484, 495 (1990).

The reasonable doubt element of *Blakely* is precisely the type of rule covered by *Teague*'s second exception. *See generally Rethinking Retroactivity*, 118 HARV. L. REV. 1642 (2005) (tracing the roots of accuracy as requiring retroactivity and opining that *Apprendi* should apply retroactively). This Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), demonstrates that the reasonable doubt standard is both fundamental and necessary to accuracy in criminal cases.

In *Schriro*, this Court concluded that the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which applied *Apprendi* to Arizona's capital sentencing scheme, does not apply retroactively under *Teague*. The Court reiterated *Teague*'s second exception for rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, 542 U.S. at 352. It then elaborated: "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of

an accurate conviction is *seriously* diminished.'" *Id.* (quoting *Teague*, 489 U.S. at 313). Under this analysis, the Court rejected the Ninth Circuit's conclusion that *Ring* fell within the second *Teague* exception, concluding that judicial factfinding under a reasonable doubt standard was not shown to "seriously diminish" the accuracy of the sentencing. *Id.* at 356.

In *Schriro* this Court also recognized the fundamental role that the reasonable doubt standard plays in assuring accuracy in criminal proceedings. The Court had no question *Apprendi* rights were "fundamental." *Schriro,* 542 U.S. at 358. The question became whether the difference between judicial and jury factfinders jeopardized the accuracy of convictions sufficiently to require retroactive application of the new rule. The analysis of the competing strengths and weaknesses of factfinders assumed application of the beyond a reasonable doubt standard of proof. The jury trial right only applied prospectively because judicial factfinding beyond a reasonable doubt adequately protected accuracy. Under a preponderance standard, however, the protection of accuracy is as lacking as the right to a jury.

This Court has reiterated the central role of the reasonable doubt standard to protecting the rights of the accused and the accuracy of criminal convictions in many other contexts before *Schriro*. In finding that reasonable doubt instructional error could not be harmless, the Court emphasized the vital role of the reasonable doubt standard in avoiding convictions based on factual error. *See Cage v. Louisiana*, 498 U.S. 39, 39-40

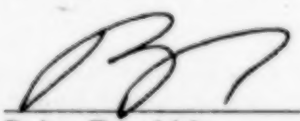
(1990) ("[I]t is a prime instrument for reducing the risk of convictions resting on factual error."). In *Winship*, the Court stated that the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." 397 U.S. at 363.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

DATED this 10th day of February 2006.

Respectfully submitted,



Brian Tsuchida
Counsel of Record
Office of the Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle, WA 98101
(206) 553-1100
Counsel for Applicant

Appendix

142 Fed.Appx. 297, 2005 WL 1793351 (C.A.9 (Wash.))
(Cite as: 142 Fed.Appx. 297)

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,Ninth Circuit.

Lonnie Lee BURTON, Petitioner-Appellant,

v.

Doug WADDINGTON, Respondent-Appellee.

No. 03-35095.

D.C. No. CV-02-00140-RSL.

Argued May 3, 2004.

Submission Vacated May 11, 2004.

Submitted July 28, 2005.

Decided July 28, 2005.

Background: State inmate filed petition for writ of habeas corpus. The United States District Court for the Western District of Washington, Robert S. Lasnik, J., denied petition, and petitioner appealed.

Holdings: The Court of Appeals held that:

1(1) petitioner did not have to seek leave to file second or successive habeas petition;

2(2) finding that sentencing court was not vindictive in imposing exceptional sentence was reasonable; and

3(3) imposition of exceptional sentence did not violate *Apprendi*.

Affirmed.

West Headnotes

[1] Habeas Corpus 197 ⇐894.1

197 Habeas Corpus

197IV Operation and Effect of Determination; Res Judicata; Successive Proceedings

197k894 Refusal to Discharge; Subsequent Applications; Prejudice

197k894.1 k. In General. Most Cited Cases

State inmate was not required to seek leave to file second or successive habeas petition, despite dismissal of his prior petition, where no meaningful relief could have been available when first petition was filed, since inmate's challenge to his sentence was still pending before state court of appeal. 28 U.S.C.A. § 2244(b)(3)(A).

[2] Habeas Corpus 197 ⇐507

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k503 Judgment, Sentence, or Order

197k507 k. Excessiveness. Most Cited Cases

State court's determination that sentencing court was not vindictive in imposing exceptional sentence at petitioner's third sentencing hearing was not contrary to, and did not represent unreasonable application of clearly established federal law under *North Carolina v. Pearce*, and thus did not warrant federal habeas relief, where petitioner's third sentence was lower than his original sentence. 28 U.S.C.A. § 2254.

[3] Jury 230 ⇐34(1)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k34 Restriction or Invasion of Functions of Jury

230k34(1) k. In General. Most Cited Cases

Sentencing and Punishment 350H ⇐322

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142 Fed.Appx. 297, 2005 WL 1793351 (C.A.9 (Wash.))
(Cite as: 142 Fed.Appx. 297)

350H Sentencing and Punishment
350HIII Sentencing Proceedings in General
350HII(F) Evidence
350Hk322 k. Degree of Proof. Most Cited Cases

Sentencing court's imposition of exceptional sentence following defendant's convictions for rape, burglary, and robbery did not violate *Apprendi*, where statutory maximum for each offense was life imprisonment, and sentence imposed was for total of 562 months. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254; West's RCWA 9A.20.021(1)(a), 9A.44.040, 9A.52.020(2), 9A.56.200(2).

*298 Brian Tsuchida, FPDWA-Federal Public Defender's Office, Seattle, WA, for Petitioner-Appellant.

John J. Samson, AGWA-Office of the Washington Attorney General, Olympia, WA, for Respondent-Appellee.

Appeal from the United States District Court for the Western District of Washington; Robert S. Lasnik, District Judge, Presiding.

Before TASHIMA, PAEZ, and BEA, Circuit Judges.

MEMORANDUM *

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**1 Lonnie Lee Burton ("Burton") appeals the district court's denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1994, a jury convicted Burton of rape in the first degree, robbery in the first degree, and burglary in the first degree. FN1 Burton challenges his consecutive sentence of 304 months for the rape, 153 months for the robbery, and 105 months for the burglary, for a total of 562 months on several constitutional grounds. We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm. We review *de novo* a district court's denial of a petition for writ of habeas corpus under 28 U.S.C. § 2254. *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir.2001).

FN1. As the parties are familiar with the facts, we do not recite them here.

I.

[1] The state argues that the district court lacked jurisdiction over Burton's 2002 habeas petition because this court had not granted leave to file a " second or successive" petition pursuant to 28 U.S.C. § 2244(b)(3)(A). We disagree. In 1998, Burton filed his first federal habeas petition challenging his conviction. At that time, the state court judgment as it related to Burton's sentence was not yet final because Burton's challenge to his sentence was still pending before the state court of appeal. Because Burton had not yet exhausted his federal constitutional claims in state court at the time he filed his first federal habeas petition, they were not ripe for federal habeas review. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring a state prisoner to exhaust his claims in state court before he is allowed to bring an action in federal court for habeas relief). Therefore, Burton was not required to challenge his sentence in his first federal petition because no meaningful relief would have been available at that time. *See LaGrand v. Stewart*, 170 F.3d 1158, 1159 (9th Cir.1999) (order). We agree with the district court *299 that Burton's petition is not "second or successive" because he had a "legitimate excuse for failing to raise a claim at the appropriate time." *See McCleskey v. Zant*, 499 U.S. 467, 490, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

II.

Burton claims that his due process rights were violated when the trial court increased his offender score at the sentencing hearing by separately counting his Indiana theft and fraud convictions, rather than aggregating them as it had done in the first and second sentencing hearings. Because Burton has not shown that the Washington Court of

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Appeals' application of the law of the case doctrine was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States" 28 U.S.C. § 2254(d)(1), we affirm the district court's denial of relief on this claim.

III.

[2] Burton next argues that his due process rights were violated because the sentencing court was vindictive in imposing an exceptional sentence at his third sentencing hearing. As the Washington Court of Appeals noted, Burton's third sentence is lower than his original sentence, and is therefore not presumptively vindictive under *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because Burton has not shown that the trial court was vindictive in violation of clearly established federal law, Burton's claim is not cognizable under 28 U.S.C. § 2254(d)(1).

IV.

**2 Finally, Burton argues that his exceptional sentence was imposed in violation of his Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We expanded the Certificate of Appealability and requested supplemental briefing on the impact of *Blakely* and *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), on this case.

Although *Apprendi* was decided before Burton's conviction became final and may therefore be applied to this case, the state argues that *Blakely* -decided after Burton's conviction became final-established a new rule that does not apply retroactively on collateral review. *See Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). We agree. *See Schardt v. Payne*, 414 F.3d 1025 (9th Cir.2005) (holding that *Blakely* does not apply retroactively to a 28 U.S.C. § 2254 habeas petition).

[3] *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. The statutory maximum for each of the offenses to which Burton was found guilty was life imprisonment. *See* WASH. REV.CODE §§ 9A.44.040(2), 9A.52.020(2), 9A.56.200(2) (classifying rape in the first degree, burglary in the first degree, and robbery in the first degree as class A felonies); § 9A.20.021(1)(a) (setting statutory maximum for class A felonies as life imprisonment). At Burton's third sentencing hearing, the judge imposed consecutive sentences of 304 months for the rape conviction, 153 months for the robbery conviction, and 105 months for the burglary conviction, for a total of 562 months. Because*300 the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate *Apprendi*. *See United States v. Shryock*, 342 F.3d 948, 989 (9th Cir.2003) (holding that where statutory maximum for murder in either the first or second degree was life imprisonment, court did not err in sentencing under provision for first degree murder on the basis of judge-found facts); *United States v. Sua*, 307 F.3d 1150, 1154 (9th Cir.2002) (holding that *Apprendi* was not violated where sentence imposed did not exceed the statutory maximum); *see also United States v. Buckland*, 289 F.3d 558, 570 (9th Cir.2002) (en banc) (finding no *Apprendi* violation where none of the individual sentences imposed consecutively exceeded the statutory maximum for that offense).

Accordingly, we **AFFIRM.**

C.A.9 (Wash.),2005.
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Briefs and Other Related Documents (Back to top)

- 2004 WL 540092 (Appellate Brief) Petitioner-Appellant's Reply Brief (Jan. 20, 2004)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

LONNIE LEE BURTON,

Petitioner - Appellant,

v.

DOUG WADDINGTON,

Respondent - Appellee.

No. 03-35095

D.C. No. CV-02-00140-RSL
Western District of Washington,
Seattle

ORDER

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b).

Therefore, the petition for rehearing and the petition for rehearing en banc are DENIED.

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CV 02-00140 #00000014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

CASE NO. C02-140L

REPORT AND RECOMMENDATION

INTRODUCTION

Petitioner Lonnie L. Burton is a state prisoner currently incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington. He seeks relief under 28 U.S.C. § 2254 from a 562-month sentence, resulting from his 1994 King County Superior Court conviction on charges of first degree rape, first degree robbery and first degree burglary, with a weapon enhancement on all three. (Dkt. 3.) Specifically, petitioner challenges the 1998 re-sentencing for his 1994 conviction, but not the underlying conviction. After careful consideration of the record, the Court concludes that no evidentiary hearing is required, and that the Court should deny petitioner's § 2254 petition and dismiss this action with prejudice.

FACTUAL AND PROCEDURAL HISTORY

The Court of Appeals for the State of Washington summarized the facts of petitioner's case as follows:

> On October 18, 1991, Lonnie Burton followed M.C., a 15-year-old boy, home from school. According to M.C.'s testimony, there was a knock on the door shortly after he arrived from school. M.C. answered the door and found Burton selling season tickets for a local hockey team. After M.C. declined to purchase the tickets, Burton asked whether he could use the telephone. When M.C. refused, Burton took out his gun and forced his way into the home
>
> He ordered M.C. to go upstairs and into his bedroom and not look at him. Burton then proceeded to have oral and anal intercourse with M.C. by force After he finished his sexual acts, Burton told M.C. to look at the clock and not move for 15 minutes. Before he left the house, Burton took $160 from the dresser of M.C.'s parents. Later, M.C.'s father arrived and found M.C. still frightened that Burton was in the house. M.C. told his father about the incident and they called the police.
>
> After gathering evidence and searching for witnesses, the police were unable to identify the perpetrator and, a month later, marked the case as inactive. Burton had left Washington for Indiana a few days after the incident. Indiana authorities, however, detained Burton for reasons unrelated to this crime. While in an Indiana jail, Burton told inmate James Martin about the rape of M.C. as well as about a separate rape incident in Snohomish County. Martin wrote a letter to Snohomish County deputy prosecutor about the two rape incidents.
>
> Burton stood trial in King County Superior Court for the rape of M.C. and for robbery and burglary, all in the first degree. Although the physical evidence was inconclusive, M.C. had identified Burton from a line-up as the one who most looked like his assailant. In addition, a neighbor picked Burton out of a photomontage and described a car she saw on the date of the incident that closely resembled the car Burton borrowed that week. And, another inmate, one in Snohomish County jail, was able to recite details of M.C.'s rape that Burton had revealed to him.
>
> A jury convicted Burton of all three charged crimes About a year after imposing consecutive sentences totaling 562 months, the sentencing court had to recalculate his offender scores because an unrelated prior conviction was overturned. In imposing a new sentence, the sentencing court ran the robbery and burglary convictions *concurrent* with the rape conviction rather than consecutive to each other. Nonetheless, the aggregate sentence still totaled 562 months. In his first appeal, [the Court of Appeals] concluded that this sentence was not clearly excessive. But, since Burton was eligible for

> fewer good time credits than in his original sentence, [the Court] presumed vindictiveness following Pearce and its progeny.

(Dkt. 12, Exh. 2 at 2-4 (emphasis in original) (footnotes omitted).) The Supreme Court for the State of Washington denied review of the Court of Appeals' decision on December 3, 1997 (Dkt. 3 at 3.)

On remand, the sentencing court imposed the same 562-month aggregate sentence, but this time ran the three convictions consecutive to each other – rape for 304 months, robbery for 153 months and burglary for 103 months. (Dkt. 12, Exh. 1.) The Superior Court entered this second amended judgment and sentence on March 16, 1998. Petitioner again appealed to the Court of Appeals for the State of Washington.

While that appeal of the re-sentencing was pending in state court, petitioner filed a habeas petition in this court on December 28, 1998, challenging the 1994 conviction. (*Id.*, Exh. 5.) This Court consolidated the 1998 petition with another petition that had been filed earlier under Case No. C98-1844L. The Court ultimately denied the consolidated petition with prejudice (*Id.*, Exh. 6.) The Ninth Circuit affirmed the decision in an unpublished opinion *Burton v Walter*, No. 00-35579, 2001 WL 1243655 (9th Cir. May 30, 2001), *cert. denied*, 122 S. Ct. 1923 (2002).

On July 17, 2000, the Court of Appeals for the State of Washington affirmed petitioner's sentence. (Dkt. 12, Exh. 2.) The Supreme Court for the State of Washington denied review on December 5, 2000. (*Id.*, Exh. 4.) Petitioner then filed a personal restraint petition ("PRP") in the Supreme Court, which raised an *Apprendi* challenge to his sentence. *See In re Burton*, Supreme Court Cause No. 72010-0.

On January 18, 2002, petitioner filed the instant habeas petition. (Dkt. 3.) On the same date, petitioner lodged a motion to stay the proceedings pending the resolution of his PRP in the state courts. (Dkt. 4.) The PRP was denied, and, on April 2, 2002, petitioner's Motion to Modify the Commissioner's Ruling was also denied. (*See* Dkt. 13 at 18.) On April 11, 2002,

the Court ordered a response to petitioner's habeas petition and motion to stay. (Dkt. 5.) As a part of the response, respondent was directed to state whether petitioner had exhausted available state remedies and whether the action may properly be stayed pending a decision by the state Supreme Court on petitioner's PRP. (*Id.* at 2.)

On May 4, 2002, respondent filed a response to the motion to stay the proceedings. (Dkt. 7.) Respondent conceded that petitioner's claims have been exhausted, but asserted that this Court lacks subject matter jurisdiction over the petition because petitioner failed to obtain permission from the Ninth Circuit Court of Appeals to file the petition as required under 28 U.S.C. § 2244(b)(3)(A) for "second or successive" habeas actions [1] Respondent thus argued that the Court should deny the motion to stay the petition. (*Id.* at 2.) Alternatively, respondent argues that petitioner's motion to stay should be denied because the petition constitutes an abuse of the writ as petitioner could have raised the claims in his previous 1998 petition. (*Id.* at 3.) Petitioner filed a reply on May 13, 2002, arguing that his current challenge was not exhausted in 1998 and, therefore, could not have been brought with his previous claims. (Dkt. 8.)

The Court was not convinced that petitioner's habeas action should be dismissed for lack of subject matter jurisdiction, and ordered respondent to file an Answer to the habeas petition which specifically addressed the issue of "second or successive petitions," as well as whether petitioner's sentencing claims were ripe at the time he filed his first habeas petition. (Dkt. 10.)

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[1] In Case No. C98-1844L, petitioner challenged the sentence in a different case: his 1992 convictions of second degree rape of a child, second degree child molestation and second degree exploitation of a minor. (*See* Case No. C98-1844L, Dkt. 2.) In Case No. C98-1846L, petitioner challenged specific evidence admitted during the 1994 trial in this case, which resulted in convictions of first degree rape, first degree robbery and first degree burglary. (*See* Case No. C98-1846L, Dkt. 2.) The 1994 convictions underlie petitioner's exceptional sentence which he challenges in the instant habeas action.

On August 16, 2002, respondent filed an Answer and Memorandum of Authorities. (Dkt. 11) On September 5, 2002, petitioner filed his Response. (Dkt. 13.) The briefing is now complete and the petition is ripe for review.

GROUNDS FOR REVIEW

In his habeas petition, petitioner alleges that his due process rights were violated in four respects when (1) the trial court improperly increased his offender score at sentencing; (2) the trial court imposed an exceptional sentence based on aggravating factors that were either previously rejected or not offered; (3) the trial judge was actually vindictive against him; and (4) the sentence petitioner received which was in excess of the top range set by statute was based on factors not submitted to a jury nor proved beyond a reasonable doubt. (Dkt 3 at 5-6.)

DISCUSSION

Exhaustion

It is well established that state remedies must first be exhausted on all issues raised in a federal habeas corpus petition. *Rose v Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b), (c). Exhaustion must be shown either by providing the highest state court with the opportunity to rule on the merits of the claim or by showing that no state remedy remains available. *Johnson v Zenon*, 88 F 3d 828, 829 (9th Cir. 1996). Respondent concedes that petitioner has exhausted his habeas corpus claims and, thus, habeas review is appropriate.[2] (Dkt. 11 at 4); *see also Gray v Netherland*, 518 U.S. 152, 162-63 (1996) (discussing the exhaustion doctrine)

Standard of Review

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either: (1) resulted in a decision that was

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[2] Petitioner initially moved to stay the habeas proceeding while he pursued an *Apprendi* claim by way of PRP in the Supreme Court for the State of Washington. (Dkt. 4) However, the PRP has since been denied and respondent concedes exhaustion of all claims. Thus, petitioner has now withdrawn his motion to stay. (Dkt. 13 at 7.)

contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S C. § 2254(d)

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the U.S. Supreme Court on a question of law, or if the state court decides a case differently than the U.S. Supreme Court has on a set of materially indistinguishable facts. *See Williams v Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id* The Ninth Circuit has interpreted "an unreasonable application of law" to mean an application that is "clearly erroneous." *Van Tran v Lindsey*, 212 F 3d 1143, 1152-54 (9th Cir.), *cert denied*, 531 U S. 944 (2000).

In addition, if a habeas petitioner challenges the determination of a factual issue by a state court, such determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Second or Successive Petitions

Respondent initially contends that this Court lacks jurisdiction to review petitioner's habeas claims because petitioner has failed to obtain permission from the Ninth Circuit Court of Appeals to file a "second or successive" petition as mandated by 28 U.S.C § 2244(b)(3)(A). (Dkt. 11 at 6.) Respondent argues that the instant petition is "second or successive" because petitioner's current sentencing claim was ripe at the time he filed his 1998 habeas petition, and therefore, he should have either raised it at that time, or he should have waited to file a petition

until his sentencing claim was exhausted.[3] (Dkt. 11 at 6-8) Respondent concludes that because petitioner chose to file a habeas petition in 1998 that did not include the current sentencing claim, he cannot return to federal court to pursue relief now without first satisfying 28 U.S.C. § 2244(b). (*Id.* at 9.)

Petitioner answers that while his claims challenging his conviction were ripe for review in 1998, and were at risk of being precluded by the statute of limitations if not filed at that time, his current sentencing challenge was not ripe because it had not yet been exhausted in the state courts. (Dkt. 13 at 7.) Petitioner further argues that, in fact, at the time he filed the challenges to his conviction in this Court, he had just been re-sentenced for a third time and he had filed a direct appeal in the Court of Appeals for the State of Washington; therefore, it would have been improper to raise the sentencing claim in 1998. (*Id.* at 7-8.) Petitioner also contends that he could not have waited until his sentencing appeal had been exhausted before filing his challenge to the underlying conviction, as the conviction had been affirmed on appeal in the state courts, and any claim challenging that conviction in federal court would have expired in January 1999. (*Id* at 7.) For the following reasons, the Court agrees.

As a threshold matter, the Court finds that petitioner's current sentencing claim was not ripe for review at the time he filed his first habeas petition in 1998. Indeed, the parties agree that petitioner had not exhausted the claim in the state courts at the time of filing, and therefore, this Court could not have reviewed it. (*See* Dkt. 11 at 8-9.) Thus, had petitioner raised the claim in 1998, he would have presented a "mixed petition," which would have necessarily been dismissed by this Court until his sentencing claim was exhausted. *See Rose, supra.* Yet, this is exactly the scenario that respondent asserts should have occurred. (*Id.* at 6) Respondent then concedes that had petitioner raised the sentencing claim in his first petition, and had the Court

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[3] It is not clear to the Court how respondent determined petitioner's claim to be both "ripe for review" and "unexhausted" at the same time. (*See* Dkt. 11 at 8-9)

then dismissed the petition without reaching the merits, petitioner would not now be filing a "second or successive" petition, as supported by *Stewart v Martinez-Villareal*, 523 U.S. 637 (1998) (holding that a claim previously dismissed as premature does not qualify as "second or successive" for Antiterrorism and Effective Death Penalty Act's ("AEDPA") purposes), and *LaGrand v Stewart*, 170 F.3d 1158 (9th Cir. 1999) (holding that petitioner was not required to obtain leave to file a second or successive habeas petition where that claim was not ripe at the time of petitioner's first habeas petition). (Dkt. 11 at 7.)

The Court finds respondent's argument to be misguided. A previously filed habeas petition does not necessarily render a subsequent petition "second or successive." *See Hill v Alaska*, 297 F.3d 895 (9th Cir 2002). In *Hill*, the Ninth Circuit stated that since "AEDPA does not define the terms 'second or successive[,]' [t]he Supreme Court, the Ninth Circuit, and our sister circuits have interpreted the concept incorporated in this term of art as derivative of the 'abuse-of-the-writ' doctrine developed in pre-AEDPA cases." *Hill*, 297 F 3d at 897-98 (citations omitted). In *McCleskey v Zant*, 499 U.S. 467 (1991), the Supreme Court explained that "the abuse-of-the-writ doctrine . . . [has] concentrate[d] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *Id.* at 490. In the instant case, petitioner did not raise the challenge to his sentence in his 1998 petition because he knew to do so would be futile (*See* Dkt. 13 at 8-9.) The claim was pending on direct appeal in the state courts and therefore this Court could not have reviewed it. Although petitioner had been sentenced, and arguably had the facts available on which to base a claim in his first habeas petition, he was precluded by law from properly raising it until the state courts' final decisions had been rendered. It was not until 2000 that the sentencing court's decision became final. (Dkt. 12, Exh. 4.) It would be illogical to require petitioner to preserve his sentencing claim by raising it before it was ripe for review (and quite possibly moot depending on the outcome in the state appeals court), only to result in this Court dismissing the

claim as unexhausted, just so that he could later bring a second habeas petition without leave of the Ninth Circuit.

Respondent argues alternatively that petitioner should have waited to file all of his claims until after his sentence became final in December 2000. (Dkt 11 at 8-9.) This, too, is misguided. Had petitioner waited to file his claims challenging his conviction, he was at risk of losing the opportunity to present them in 2002 due to the one-year statute of limitations imposed under AEDPA. Arguably, petitioner's conviction became final on June 9, 1997, when the Court of Appeals for the State of Washington affirmed his conviction but overturned his sentence. (Dkt. 12, Exh 3.) His case was remanded to the trial court solely for the purpose of re-sentencing. While petitioner continued to challenge his new sentence on direct appeal, his claims challenging the conviction had been exhausted. In fact, this Court, in reviewing petitioner's 1998 petition, agreed that his claims were ripe for review. (*See* Case No. C98-1844L, Dkt. 38.) This Court determined that the properly exhausted claims should be addressed on the merits, and subsequently denied them as without merit. (*See id* at 16) Thus, this Court apparently agreed that petitioner's conviction was final and ripe for review, despite the pending appeal of his sentence.

In *Martinez-Villareal*, *supra*, the Supreme Court addressed the situation where a petitioner has raised a claim in his first petition, which is then dismissed by the District Court as premature, and then is raised later in a second habeas petition when it becomes ripe for review. *Martinez-Villareal*, 523 U S. at 643. In that case, the government argued that because the petitioner had already raised the claim in his first petition, he must obtain leave from the Circuit Court before proceeding with a second habeas challenge. *Id* The Court rejected the argument, stating that "[i]f [the government's] interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse." *Martinez-Villareal*, 523 U.S. at 644. While the Court limited its holding to cases where a claim has been

previously raised, dismissed as premature, and then re-raised, this Court finds that the same reasoning applies to the instant case. *See Martinez-Villareal*, 523 U.S. at 645 n.*

In both situations, the petitioner has not received an adjudication of his claim by the federal court. The *Martinez-Villareal* Court recognized the necessity of exhausting claims in the state courts before allowing habeas review. The holding was grounded on the fact that petitioner's claim was premature and could not be heard by the federal court in his first petition, not on the fact that he had given notice to the Court by raising it once prematurely and then raising it a second time when it was ripe. *See Martinez-Villareal*, 523 U.S. at 644-45. Although the Court also stated that the *Martinez-Villareal* case did not present a situation where a petitioner was raising a claim for the first time in a second petition, as is the instant case, the Court did not say this situation would result any differently *Martinez-Villareal*, 523 U.S. at 645 n.*. Rather, the Court stated that it "ha[d] no occasion to decide whether such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." *Id*

Finally, in *LaGrand, supra*, the Ninth Circuit held that a petitioner is not required to obtain leave from the Ninth Circuit to file what is "functionally" a first petition as to a previously unripe claim *LaGrand*, 170 F.3d at 1160. Again, respondent argues that this case does not apply to the instant situation because petitioner is raising a new claim for the first time, and *LaGrand* involved a petitioner who had raised the claim in his first petition, the Court dismissed it as unripe, and then the petitioner raised it again when it became ripe. (Dkt. 11 at 7-8) The Court finds this difference to be immaterial. In *Hill, supra*, the Ninth Circuit recognized that the term "second or successive" did not apply "if the [petitioner] did not have an opportunity to challenge the state's conduct in a prior petition." *Hill*, 297 F.3d at 898. Here, petitioner did not have the opportunity to challenge his sentence in 1998 because his sentencing claim was not ripe for review as respondent asserts. Moreover, as discussed above, petitioner could not have waited to file his 1998 petition or he would have risked losing the opportunity to

challenge his underlying conviction. Therefore, the Court finds that the instant habeas petition is not "second or successive," and thus, does note require leave under 28 U S C § 2244(b) to pursue the claim on the merits.

Claims One, Two and Three - Improper Increase in Offender Score/Vindictiveness

Petitioner first claims that his due process rights were violated when the sentencing court improperly increased his offender score at his third re-sentencing in order to justify imposing an exceptional sentence (Dkt. 3 at 5.) Petitioner argues that his three previous King County convictions should have been merged for sentencing purposes, but that instead, the sentencing judge, with actual vindictiveness, chose to un-merge all prior convictions in order to continue to impose an exceptional sentence. (Dkt 13 at 9-10.) Petitioner concludes that had the sentencing judge merged all prior convictions, his offender score would have been 9 instead of 16, and therefore, his sentence would have been less severe. (*Id.* at 15.) Petitioner also argues that the trial court imposed an exceptional sentence based on aggravating factors that were either previously rejected or not offered. (Dkt. 3 at 5.) Respondent answers that the state courts reasonably denied petitioner's claims because the Superior Court properly sentenced petitioner under Washington law, and because petitioner has failed to prove actual vindictiveness. (Dkt. 11 at 11.)

In denying petitioner's first claim, the Court of Appeals for the State of Washington stated:

> Burton argues that the sentencing court exceeded its scope on remand and invoked a Pearce presumption (again) by imposing the same aggregate sentence. The Pearce presumption arises when the amended sentence is more severe than the original sentence following a partially successful appeal. Pearce, 395 U.S. at 723-26. When the sentencing court does not increase the aggregate period of incarceration, the Pearce presumption does not arise. State v. Larson, 56 Wn. App. 323, 326, 783 P.2d 1093 (1989). Here, the sentencing court did not increase Burton's aggregate sentence

Nonetheless, the Pearce presumption also arises when parole considerations can make the period of incarceration under the amended sentence longer than the original sentence. See Steele, 988 F.2d at 998 (parole after serving one-third of sentence was more severe than the original sentence that gave discretion to parole board). Previously on appeal, the Court of Appeals held that Burton's amended sentence was more severe than his original sentence because he was eligible for nearly four years fewer good time credits. Burton, 1997 WL 306429, at *14. This was so because the amended sentence ran concurrently so that the entire period of incarceration followed the 562-month rape sentence which limits good time to 15 percent of the term as opposed to one-third for non-rape offenses. RCW 9.94A150(1) After the appeal, however, the sentencing court imposed consecutive sentences (562 months total) that allow Burton the opportunity to earn good time credits as favorably as his original sentence. Burton will be able to reduce his sentences for robbery (105 months) and burglary (153 months) by up to one-third each and reduce his rape sentence (304 months) by 15 percent. RCW 9.94A.150(1) He is eligible to earn early release time in segments adding up to a total of 131.60 months as opposed to 130.74 months in the original sentence. Burton, 1997 WL 306429 at *14. His new sentence is slightly less severe than his original sentence. Accordingly, the Pearce presumption does not apply and the sentencing court did not exceed the scope of remand.

Burton further argues that the trial court exceeded the scope of remand in recalculating his offender scores. Generally, the law of the case doctrine would make the offender score binding in subsequent appeals. State v. Worl, 129 Wn.2d 426, 425, 918 P.2d 905 (1996). Except, the doctrine is discretionary when controlling law changes between the appellate decision and proceedings on remand. Coffel v. Clallam County, 58 Wn.App. 517, 521, 794 P 2d 513 (1990). Before Burton's third sentencing hearing, the Washington Supreme Court held that under RCW 9.94A 360(6), a sentencing court may not count some concurrently-served prior convictions as one offense and count others separately. State v. Bolar, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996). Rather, the sentencing court must count concurrently served prior convictions as one offense or each as separate offenses. Bolar, 129 Wn.2d at 366. Since the Washington Supreme Court made this ruling before the third sentencing hearing, the sentencing court was correct in recalculating Burton's offender score for rape as follows:

Offense	Sentence Date	Cause No.	Score
Forgery	5/31/1991	90-1-06110-4	1
Fraud (Indiana)	1/9/1992	10E01 9110 CF 636	1
Theft (Indiana)	1/9/1992	10E01 9110 CF 636	1
Sexual Exploitation of a Minor	11/20/1992	92-1-02798-1	3
Child Molestation 2	11/20/1992	92-1-02798-1	3
Rape of a Child 2	11/20/1992	92-1-02798-1	3
Robbery 1	(Count II)	93-1-06948-7	2
Burglary 1	(Count III)	93-1-06948-7	2
Offender Score for Rape			16

Following Bolar, the court properly added Burton's offender score for rape after counting his concurrently served prior convictions as separate offenses. Therefore, the court did not exceed the scope of remand.

(Dkt. 12, Exh. 2 at 6-8 (footnote omitted).)

Petitioner relies on the "law of the case doctrine" for the proposition that the sentencing judge was required to use the same method of computing his offender score because the Court of Appeals for the State of Washington had affirmed the calculation; thus, the judge should have merged his prior King County convictions as she had done with the prior Indiana convictions, instead of un-merging the Indiana convictions so that she could also count the King County convictions separately. (Dkt. 13 at 10-11.) Petitioner's reliance on the doctrine is misplaced.

In *Jeffries v Wood*, 114 F.3d 1484 (9th Cir. 1997), the Ninth Circuit Court of Appeals explained that the "law of the case is a discretionary doctrine," and that the doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Jeffries*, 114 F.3d at 1489 (quoting *Messenger v Anderson*, 255 U S. 436, 444 (1912)); *see also Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) ("The doctrine is

discretionary, not mandatory."). The Ninth Circuit noted, however, that this discretion is not unlimited. The Court stated that "the prior decision should be followed unless: '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, *(2) intervening controlling authority makes reconsideration appropriate*, or (3) substantially different evidence was adduced at a subsequent trial.'" *Jeffries*, 114 F.3d at 1489 (emphasis added) (footnote and citations omitted).

In the instant case, new controlling authority was created between the date of the appellate decision and the date of petitioner's third re-sentencing. (*See* Dkt. 13 at 9-10.) This created an exception to the "law of the case" doctrine, and provided a basis for the sentencing judge to reconsider the calculation of petitioner's offender score. Therefore, the Court of Appeals' decision pertaining to the re-calculation of petitioner's offender score was not contrary to, or an unreasonable application of, established federal law.

Petitioner next claims that the trial court erred in considering additional aggravating factors on remand, specifically one that had been raised before and then rejected, and one that had never been offered on the evidence. (*Id.* at 13.) The state appeals court had rejected this claim on the basis that the sentencing judge's decision had also been based on aggravating factors that were presented at earlier sentencing hearings, and therefore, found no error in citing to the additional factors. (Dkt. 11 at 16.) Petitioner does not articulate a specific objection to that decision, other than that it gives rise to the conclusion that the sentencing judge was actually vindictive, as discussed below. (*See* Dkt. 13 at 14-16.)

Petitioner argues that the cumulation of the trial judge's decisions during petitioner's third re-sentencing proves her actual vindictiveness. (*Id.* at 13-16.) Petitioner cites to the fact that: (1) this was the third time she had been asked to re-sentence him; (2) she un-merged his prior convictions in order to preserve the exceptional sentence she had already imposed, (3) she cited to new aggravating factors in support of the new sentence, and (4) she imposed an

"alternative" sentence in case her aggregate sentence was reversed on appeal.[4] (Dkt. 13 at 14-15.) Petitioner states that "[a]lthough the actual sentence [he] received at the third sentencing was arguably 'not more severe' than the sentence he received at the previous sentencing, it was more severe than the sentence he should have received if the sentencing judge did not go out of her way to reverse her previous rulings and adopt new and previously-rejected aggravating factors." (Dkt 13 at 14.)

In *North Carolina v Pearce*, 395 U.S. 711 (1969), the Supreme Court held that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. . . [D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Pearce*, 395 U.S. at 725. The Court further held that "[i]n order to assure the absence of such a motivation, . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear." *Id.* at 726. Here, petitioner did not receive a more severe sentence than was previously imposed, and, in fact, he is now eligible for slightly more "good time credit" (Dkt. 12, Exh. 2 at 7.) Therefore, the *Pearce* presumption of vindictiveness does not arise as a result of imposing the same aggregate sentence. Petitioner argues, however, that the presumption arises because the judge actually raised his offender score for the third sentence. (Dkt. 13 at 15.) The Court disagrees with this argument since it has already determined that the new calculation of petitioner's offender score did not violate his constitutional rights, as discussed above.

Petitioner further argues that "'where the prophylactic rule of Pearce does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon resentencing.'"

---

[4] The Court of Appeals for the State of Washington subsequently vacated the "alternative" sentence imposed by the trial judge at the same time the Court affirmed petitioner's third sentence. (Dkt. 12, Exh. 2 at 11-12.)

(Dkt. 13 at 14 (quoting *Texas v McCullough*, 475 U.S. 134, 138 (1986) (citation omitted).) The Court does not believe petitioner has proven actual vindictiveness. First, petitioner received a "better" sentence than he had received earlier as he now has an opportunity to earn more early release credits. Second, as discussed above, the Court has found that there was no impropriety in recalculating his offender score. Third, although the sentencing judge cited additional aggravating factors in support of the imposed exceptional sentence, the "exceptionality" of the sentence did not rely on the additional factors, so there was no prejudice to the petitioner by citing them. (*See* Dkt. 12, Exh. 2 at 11.) Finally, the state court of appeals noted that the presumption of vindictiveness had arisen from petitioner's second re-sentencing "only because the sentencing judge ran Burton's sentences concurrently instead of consecutively. . . . The presumption of vindictiveness was a technical one. Nothing in the record indicates that the sentencing judge, (who was also the trial judge), possessed actual bias towards Burton." (Dkt. 12, Exh. 2 at 5.) Therefore, the fact that the *Pearce* presumption was applied to petitioner's re-sentencing previously does not convince the Court that the judge was actually vindictive at the third re-sentencing. Thus, petitioner's claims that his sentence violated his due process rights fails

Finally, petitioner argues that his sentence violates the recent decision by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v Arizona*, __ U.S. __, 122 S. Ct. 2428 (2002), in that the sentenced imposed was above the statutory maximum and was based on factors determined by the judge, not the jury. (Dkt 13 at 17-27.) Respondent answers that petitioner's sentence does not exceed the statutory maximum for his crime, so *Apprendi* and *Ring* do not apply. (Dkt. 11 at 17.) The Court agrees with respondent. Petitioner attempts to assert that he is serving 562 months only for his first degree rape conviction, while ignoring the fact that he was also convicted of first degree robbery and first degree burglary, with a weapon enhancement on all three crimes. Petitioner actually received an aggregate 562-month sentence for all three counts - 304 months for the rape count, 153

months for the robbery count and 105 months for the burglary count, to run consecutively. (Dkt. 12, Exh. 2 at 4) Petitioner concedes that the maximum penalty he could have received for the rape was 304 months. (Dkt. 13 at 25.) This is, in fact, what he received. Petitioner makes no mention of the other two parts of his aggregate sentence. Thus, petitioner's sentence was not outside the statutory maximum for his crime, and he fails to show any due process violation Accordingly, the Court should dismiss petitioner's habeas action with prejudice.

CONCLUSION

For the reasons set forth above, I recommend petitioner's claims for federal habeas relief be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation

DATED this 8 day of November, 2002.

JOHN L. WEINBERG
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHAMBERS OF
JOHN L. WEINBERG
UNITED STATES MAGISTRATE JUDGE

304 U.S. COURTHOUSE
SEATTLE, WA 98104
(206) 553-5774

November 8, 2002

FILED
LODGED
ENTERED
NOV - 8 2002
AT SEATTLE
CLERK U.S. DISTRICT COURT
BY WESTERN DISTRICT OF WASHINGTON
DEPUTY

Mr. Lonnie L. Burton
978598
Stafford Creek Correction Center
191 Constantine Way
Aberdeen WA 98520

Mr John J. Samson
Attorney General's Office
Criminal Justice Division
P O Box 40116
Olympia WA 98504-116

Re: Lonnie L Burton v Doug Waddington
C02-140L

Dear Mr. Burton and Mr. Samson:

Enclosed are copies of my Report and Recommendation, proposed order and proposed judgment in the above-captioned case. The originals are being filed with the Clerk. This Report and Recommendation is not an appealable order. Any notice of appeal should not be filed until the District Judge enters judgment in this case.

Objections to the recommendation should be filed and served within **twenty-one** days of the date of this letter with copies to the Clerk for forwarding to the District Judge and to my office. Failure to file objections within the specified time waives the right to appeal any order by the District Court adopting this report and recommendation. In accordance with our local rules, you should note your objections for consideration on the Judge's motion calendar for the third Friday after they are filed. If no timely objections are filed, the matter will be ready for consideration by the District Judge on December 6, 2002.

Thank you for your cooperation.

Very truly yours,

John L. Weinberg
United States Magistrate Judge

JLW/jvl
Enclosures

cc: Hon. Robert S. Lasnik
Court File C02-140L

FILED ENTERED
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AT SEATTLE
CLERK U S DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent

CASE NO. C02-140L

ORDER DENYING HABEAS PETITION

The Court, having reviewed the Petition for Writ of Habeas Corpus, Respondent's Answer, the Report and Recommendation by the Honorable John L. Weinberg, United States Magistrate Judge, and the remaining record, finds and Orders as follows:

(1) The Court adopts the Report and Recommendation.

(2) Petitioner's Petition for Writ of Habeas Corpus (Dkt. #3) is DENIED and dismissed with prejudice

(4) The Clerk shall send copies of this order to counsel for each party and to the Honorable John L. Weinberg.

DATED this _____ day of _____, 2002.

ROBERT S. LASNIK
United States District Court Judge

United States District Court

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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AT SEATTLE
CLERK U S DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

LONNIE L. BURTON

Petitioner,

v

DOUG WADDINGTON,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C02-140L

__ **Jury Verdict** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

_X_ **Decision by Court.** This action came to consideration before the Court

IT IS ORDERED AND ADJUDGED The Report and Recommendation is adopted and approved. Petitioner's Petition for Writ of Habeas Corpus is denied and dismissed with prejudice

Dated this _____ day of _____, 2002

BRUCE RIFKIN
Clerk

Deputy Clerk

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

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AT SEATTLE
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WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

CASE NO. C02-140L

ORDER DENYING HABEAS PETITION

The Court, having reviewed the Petition for Writ of Habeas Corpus, Respondent's Answer, the Report and Recommendation by the Honorable John L. Weinberg, United States Magistrate Judge, and the remaining record, finds and Orders as follows:

(1) The Court adopts the Report and Recommendation.

(2) Petitioner's Petition for Writ of Habeas Corpus (Dkt. #3) is DENIED and dismissed with prejudice.

(4) The Clerk shall send copies of this order to counsel for each party and to the Honorable John L. Weinberg.

DATED this 17th day of December, 2002.

ROBERT S. LASNIK
United States District Court Judge

United States District Court

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

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LONNIE L. BURTON

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C02-140L

— **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court**. This action came to consideration before the Court.

IT IS ORDERED AND ADJUDGED: The Report and Recommendation is adopted and approved. Petitioner's Petition for Writ of Habeas Corpus is denied and dismissed with prejudice.

Dated this 17 day of Dec., 2002.

BRUCE RIFKIN
Clerk

Deputy Clerk

Cpz PSL Jun KC

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RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
APR 26 2006
OFFICE OF THE CLERK

NO. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE LEE BURTON,

Petitioner,

v.

DOUGLAS WADDINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROB MCKENNA
Attorney General

John J. Samson*
Assistant Attorney General
Paul D. Weisser
Senior Counsel

**Counsel of Record*
PO Box 40116
Olympia, WA 98504-0116
360-586-1445

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SUPREME COURT, U.S.

QUESTION PRESENTED

1. Whether the district court lacked subject matter jurisdiction over the habeas corpus petition where Burton had previously filed a habeas corpus petition challenging his custody, and he did not obtain leave from the Ninth Circuit to file the current petition as required by 28 U.S.C. § 2244(b).

2. Whether *Blakely v. Washington*, 542 U.S. 296 (2004) applies retroactively in collateral proceedings filed under 28 U.S.C. § 2254 to cases where the state court judgment became final, and the state court adjudication of the merits of the claim occurred, prior to the issuance of the Court's decision in 2004.

3. Assuming *Blakely v. Washington* does apply retroactively, whether the state court adjudication of Burton's claim was contrary to or an unreasonable application of the holding in *Blakely* where each individual sentence imposed on Burton did not exceed the standard sentencing range for the particular offense.

PARTIES

The petitioner is Lonnie Lee Burton. The respondent is Douglas Waddington, the Superintendent of the Stafford Creek Corrections Center.

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The Attorney General of Washington, on behalf of respondent Douglas Waddington, the Superintendent of the Stafford Creek Corrections Center, respectfully requests that this Court deny the petition for a writ of certiorari in this case. This brief in opposition is being filed pursuant to a request from this Court that a response be filed to the petition.

I. STATEMENT OF THE CASE

Burton is in custody under the judgment of a Washington state court. On March 16, 1998, the state trial court entered a second amended judgment and sentence, sentencing Burton to 562 months for his convictions for rape, robbery and burglary. The sentence is labeled an "exceptional sentence" under Washington law because the court ordered the individual sentences for each offense to run consecutive rather than concurrent to each other. However, the individual sentence for each offense fell within the standard sentencing range for the particular offense.

The standard sentencing range for the rape offense was 234 to 304 months, and the state court sentenced Burton to 304 months for the rape conviction. The standard range for the robbery offense was 153 to 195 months, and the state court sentenced Burton to 153 months for the robbery conviction. The standard range for the burglary offense was 105 to 134 months, and the court sentenced Burton to 105 months for the burglary conviction. The court imposed an exceptional sentence by running the three individual sentences consecutive to each other, but the individual sentences did not exceed the statutory standard range sentence or the statutory maximum sentence for any of the individual offenses.

Burton was convicted of the three offenses in 1994, and he appealed to the Washington Court of Appeals. The state court affirmed the convictions, but remanded for re-sentencing. *State v. Burton*, 86 Wash. App. 1046 (1997) (Table) (WESTLAW 1997 WL 306). The Washington Supreme Court denied review on December 3, 1997, and this Court denied Burton's petition for a writ of certiorari on April 20, 1998. *State v. Burton*, 133 Wash.2d 1025, 950 P.2d 475 (1997), *cert. denied*, *Burton v. Washington*, 523 U.S. 1082 (1998). On March 16, 1998, the trial court entered the second amended judgment and sentence, imposing the current sentence. Burton appealed from the sentence to the Washington Court of Appeals.

In December of 1998, while Burton's appeal of the second amended judgment and sentence remained pending in state court, he filed his first federal habeas petition challenging his custody under the 1994 convictions. Since the state court had already entered the second amended judgment and sentence at the time Burton filed his first federal petition, Burton was in custody under the same judgment challenged in this current proceeding. The district court denied the first petition with prejudice on April 6, 2000, and the Ninth Circuit affirmed the district court's judgment on May 30, 2001. *Burton v. Walter*, No. 00-35579, 2001 WL 1243655 (9th Cir. May 30, 2001). On July 17, 2000, while the first habeas proceedings were ongoing, the Washington Court of Appeals issued an opinion affirming the amended judgment and sentence. *State v. Burton*, 101 Wash. App. 1041 (2000) (Table) (Westlaw 2000 WL 987045). The Washington Supreme Court denied review on December 5, 2000. *State v. Burton*, 142 Wash.2d 1009, 16 P.3d 1266 (2000) (Table).

In January 2002, Burton returned to federal court, filing his current federal habeas corpus petition in the district court. Burton had not obtained permission from the Ninth Circuit to file the petition as required by 28 U.S.C. § 2244(b). Respondent answered the petition, arguing that the district court lacked jurisdiction because Burton had not obtained leave to file the petition. Respondent also addressed the merits of Burton's claims.

The United States Magistrate Judge issued a report and recommendation, recommending that the district court deny the petition. The magistrate judge concluded that Burton's current habeas corpus petition was not a successive petition, but also concluded that Burton was not entitled to relief on the merits of his claims. Burton objected to the report and recommendation. Respondent filed a response, again arguing the district court lacked jurisdiction. The district court adopted the report and recommendation, denied the petition, and entered judgment in favor of respondent on December 17, 2002. Burton appealed to the Ninth Circuit.

While Burton's appeal was pending in the Ninth Circuit, this Court issued the decision in *Blakely v. Washington*, 542 U.S. 296 (2004) on June 24, 2004, and the decision in *United States v. Booker*, 543 U.S. 220 (2005) on January 12, 2005. The Ninth Circuit directed the parties to submit supplemental briefing addressing the effect, if any, of *Blakely* and *Booker* on Burton's appeal. Respondent argued the rule in *Blakely* did not apply because *Blakely* announced a new rule that was not clearly established either at the time the state court judgment became final, or at the time of the state court adjudication of Burton's claim. Respondent also argued

that, even if *Blakely* did apply, Burton's sentence did not violate the *Blakely* rule. The individual sentence for each offense did not exceed the standard sentencing range for that particular offense, and the decision to run the individual sentences consecutively was based upon the fact of Burton's convictions.

After considering the supplemental arguments, the Ninth Circuit affirmed the district court's judgment. Pet. App. 1a-3a. The Ninth Circuit agreed that *Blakely* did not apply retroactively in habeas corpus proceedings. Pet. App. 3(a) (citing *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005)). The Ninth Circuit also agreed that the state court adjudication was a reasonable application of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. App. 3a.

II. REASONS FOR DENYING THE PETITION

There is no basis for granting the writ in this case. First, the district court lacked jurisdiction to consider the current habeas corpus petition because Burton did not comply with the gate keeping provisions of 28 U.S.C. § 2244(b). Second, although Burton argues the Ninth Circuit's decision conflicts with the decisions of two state courts, he does not show a legitimate conflict justifying review. The Ninth Circuit's decision is consistent with the decisions of the other circuit courts concerning the retroactive application of *Blakely* in federal habeas proceedings. In fact, every circuit court to have considered the issue has held that *Blakely* created a new rule of criminal procedure which does not apply retroactively on collateral review. Third, even if *Blakely* does apply retroactively, Burton's challenge still fails because his sentence does not violate the rule announced in *Blakely*.

A. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE HABEAS CORPUS PETITION BECAUSE BURTON DID NOT COMPLY WITH THE GATE KEEPING PROVISIONS OF 28 U.S.C. § 2244(B).

Before a petitioner may file a second habeas corpus petition in district court, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A). The statute creates a "gate keeping" mechanism for the consideration of successive petitions. *Felker v. Turpin*, 518 U.S. 651, 657 (1996). "The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court." *Id.* .The applicant must show that the application satisfies the requirements of 28 U.S.C. § 2244(b). *Id.*

Burton previously filed a federal habeas corpus petition challenging his custody under the same judgment challenged in this proceeding. The first habeas corpus petition challenged the validity of the rape, robbery and burglary convictions, but did not challenge the sentence imposed by the state court. Burton filed the prior federal petition in December 1998. The state court had previously entered the second amended judgment and sentence in March 1998. Burton therefore previously filed a habeas corpus petition challenging his custody under the second amended judgment and sentence. Burton's current habeas corpus petition is a successive petition because the petition challenges the same state court judgment challenged by the first petition. 28 U.S.C. § 2244(b) required that Burton obtain leave to file the second petition. The district court lacked jurisdiction because Burton did not obtain permission to file the second petition.

Although Burton's current petition challenges the sentence imposed for the convictions, rather than the convictions themselves, the statute still required that Burton obtain leave from the Ninth Circuit to file the current petition. Burton's current challenge to the sentence was ripe at the time he filed his first habeas corpus petition in 1998 because the state court had imposed the sentence by the time Burton filed his first petition. The Ninth Circuit determined that the current claim was not ripe when Burton filed the first petition because the claim was unexhausted. Pet. App. 2a. The Ninth Circuit confused exhaustion with ripeness.

Burton could have avoided the successive petition issue by including his current claim in the first habeas corpus petition. If he had, the first petition would be a mixed petition, containing exhausted and unexhausted claims. The district court could have dismissed the petition without prejudice as a mixed petition. In such a case, Burton could return to federal court after exhausting his sentencing claim, and the petition would not be a "second or successive" petition. *Slack v. McDaniel*, 529 U.S. 473, 486-88 (2000). In the alternative, if Burton had raised the unexhausted claim in the first petition, the district court could have stayed the first petition to allow Burton an opportunity to exhaust the unexhausted claim. *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 1532-35 (2005) (district court may hold petition in abeyance to allow exhaustion); *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807, 1813-14 (2005) (recognizing the abeyance procedure may be utilized to avoid statute of limitations issue). In such a case, Burton could have pursued all of his claims, challenging both the convictions and the sentence, in a first petition.

Burton also could have avoided the issue of a successive petition simply by choosing not to file a habeas corpus petition until he completed his state court appeal from the second amended judgment and sentence. The statute of limitations begins to run from the date the judgment became final by the conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A). The second amended judgment and sentence did not become final until March 5, 2001, ninety days after the Washington Supreme Court denied review on Burton's appeal from the amended sentence. *See State v. Burton*, 142 Wash.2d 1009, 16 P.3d 1266 (December 5, 2000) (Table). The statute of limitations did not expire until March 5, 2002. Burton filed his current petition within the statute of limitations in January 2002. Burton could have chosen to wait until he filed his current petition to raise all of his claims, challenging both the convictions and the sentence in a single petition.

Burton had several options to avoid filing a successive petition, but he chose none of these options. Instead, Burton chose to file a petition in 1998 challenging his convictions, but not his sentence. The district court considered the 1998 petition on the merits, and denied the petition with prejudice. Consequently, Burton's current petition, filed in 2002, is a successive petition. *See Slack v. McDaniel*, 529 U.S. at 486-87 ("It was only if a prisoner declined to return to state court and decided to proceed with his exhausted claims in federal court that the possibility arose that a subsequent petition would be considered second or successive and subject to dismissal as an abuse of the writ."). The district court lacked jurisdiction over the petition because Burton did not comply with 28 U.S.C. § 2244(b).

B. THE NINTH CIRCUIT'S DECISION THAT *BLAKELY* DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUIT COURTS.

Every circuit court to consider the retroactive application of the rule announced in *Blakely,* or of the equivalent rule governing federal sentences announced in *United States v. Booker*, 543 U.S. 220 (2005), has consistently held that the rule does not apply retroactively on collateral review because the rule constitutes a new rule of criminal procedure. *See, e.g., Guzman v. United States*, 404 F.3d 139, 141-44 (2nd Cir. 2005); *In re Olopade*, 403 F.3d 159, 160-64 (3rd Cir. 2005); *United States v. Gentry*, 432 F.3d 600, 602-06 (5th Cir. 2005); *Simpson v. United States*, 376 F.3d 679, 680-81 (7th Cir. 2004); *United States v. Price*, 400 F.3d 844, 845-49 (10th Cir. 2005); *United States v. Bellamy*, 411 F.3d 1182, 1186-88 (10th Cir. 2005); *In re Dean*, 375 F.3d 1287, 1290 (11th Cir. 2004); *United States v. Anderson*, 396 F.3d 1336, 1338-39 (11th Cir. 2005); *Varela v. United States*, 400 F.3d 84, 866-68 (11th Cir. 2005); *Michael v. Crosby*, 430 F.3d 1310, 1312 n.2 (11th Cir. 2005). The Ninth Circuit decision is consistent with the decisions of this Court and the other circuit courts. There is no conflict necessitating review.

1. The Circuit Courts Agree *Blakely* Created A New Rule Of Criminal Procedure That Was Not Clearly Established Prior To 2004.

All the circuit courts to consider the issue have concluded *Blakely* created a new rule of criminal procedure. *See, e.g., Schardt v. Payne*, 414 F.3d 1025, 1034-36 (9th Cir. 2005); *Simpson*, 376 F.3d at 680-81; *Price*, 400 F.3d at 847; *Varela*, 400 F.3d at 868. This conclusion is consistent with the Court's jurisprudence.

Under the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), a decision creates a new rule "when it breaks new grounds or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. A decision creates a new rule unless reasonable jurists would have felt compelled by existing precedent to grant relief. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Application of an old rule in a new setting or in a manner not dictated by precedent constitutes a new rule under *Teague*. *Stringer v. Black*, 503 U.S. 222, 228 (1992).

Burton argues *Blakely* did not create a new rule because it was merely an application of *Apprendi*. However, *Blakely* did more than simply apply *Apprendi*. *Blakely* created a new rule by altering the legal landscape that had existed for twenty years. *Simpson*, 376 F.3d at 680-81. Since the 1980s, trial judges employing determinate sentencing schemes had resolved disputed issues of fact to determine both the applicable sentencing range and the appropriateness of departures from the sentencing range. *See United States v. Penaranda*, 375 F.3d 238, 242 (2nd Cir. 2004). Before *Blakely*, this Court did not hold such practice unconstitutional. *Id.* In 2000, this Court ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. However, *Apprendi* referred to the "statutory maximum," and the lower courts commonly understood *Apprendi* to be limited to the traditional statutory maximum for an offense. *Penaranda*, 375 F.3d at 243; *Simpson*, 376 F.3d at 681. As the Ninth Circuit noted, "Every circuit court of appeals that addressed the

question presented in *Blakely* reached the opposite conclusion from the rule subsequently announced by the Supreme Court." *Schardt*, 414 F.3d at 1035 (citing cases). Prior to *Blakely*, the circuit courts simply did not apply *Apprendi* where a sentence exceeded the standard range but did not exceed the statutory maximum. *Id.* Prior to *Blakely*, the lower courts believed a trial judge could still properly resolve disputed facts when determining whether to impose a sentence above a standard sentencing range. "In fact, before *Blakely* was decided, every federal court of appeals had held that *Apprendi* did not apply to guideline calculations made within the statutory maximum." *Simpson*, 376 F.3d at 681 (citing cases).

In *Blakely*, this Court held for the first time that the "statutory maximum" for purposes of an *Apprendi* analysis includes not only the statutory maximum for an offense, but also the top end of a statutorily established standard range under a determinate sentencing scheme. *Blakely*, 542 U.S. at 302-05. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 303-04. For the first time, the Court held unconstitutional the practice followed by many courts for imposing sentences above the standard range. *Blakely*, 542 U.S. Ct. at 314-26 (O'Connor, J., dissenting); *Blakely*, 542 U.S. at 326-28 (Kennedy, J., dissenting); *Penaranda*, 375 F.3d at 243; *Simpson*, 376 F.3d at 381. In light of the sea change created by *Blakely*, the Ninth Circuit and every other circuit court to have considered the issue correctly concluded that *Blakely* created a new rule of criminal procedure.

Burton cites to two decisions in an attempt to show a conflict with the Ninth Circuit's opinion. Pet. at 7-8. Neither citation demonstrates a legitimate conflict.

Burton cites to an opinion of the Tennessee Supreme Court. *State v. Gomez*, 163 S.W.3d 632, 649-50 (Tenn. 2005), *cert. petition filed*, 74 USLW 3131 (Aug 15, 2005) (NO. 05-296). While the Tennessee Supreme Court was "of the opinion that *Blakely* did not announce a new rule," *see Gomez*, 163 S.W.3d at 649, the court was not addressing the issue presented here. The Tennessee Supreme Court did not hold that *Blakely* applies retroactively in a collateral challenge. Rather, the case came before the Tennessee Supreme Court on direct appeal. *Id.* at 640. The court determined a *Blakely* claim on direct appeal should be reviewed under the plain error standard if the appellant fails to object in the trial court. *Id.* at 648-51. In reaching the decision, the Tennessee Supreme Court noted that *Blakely* likely would not serve as a basis for relief in a collateral challenge. *Id.* at 651 n.16. The state court agreed with the conclusion of the circuit courts that *Blakely* would not apply retroactively in a collateral proceeding. *Id.*

Burton also cites to a decision of the Colorado Court of Appeals. However, that state court decision does not demonstrate a sufficient conflict under Rule 10 because it is not from a state court of last resort. In fact, the Colorado Supreme Court has granted review of that decision. *State v. Johnson*, 121 P.3d 285, 286-87 (Colo. Ct. App. 2005), *cert. granted*, 2005 WL 3066832. The existence of a legitimate conflict is doubtful since the decision will be reviewed, and likely altered, by the Colorado Supreme Court.

2. The Circuit Courts Agree *Blakely* Does Not Fall Within The Narrow Exceptions To The Non-Retroactivity Doctrine.

When an opinion of the Court creates a new rule, the rule will apply to previously final judgments on collateral review only in limited circumstances. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). New substantive rules, those which decriminalize a class of conduct or prohibit capital punishment for a particular class of defendants, will generally apply retroactively. *Id.* Substantive rules apply retroactively because a significant risk exists that the defendant stands convicted of an act that is not criminal, or faces a punishment not allowed by law. *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)). "New rules of procedure, on the other hand, generally do not apply retroactively." *Schriro*, 542 U.S. at 352. Unlike substantive rules, procedural rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* Because of this more speculative connection to innocence, the Court gives retroactive effect to only a small set of watershed rules of criminal procedure which critically enhance the accuracy of the fact finding process. *Id.* The class of rules that might fall within this exception is "extremely narrow." *Id.*

In *Schriro*, the Court considered whether *Ring v. Arizona*, 536 U.S. 584 (2002), which like *Blakely* applied the *Apprendi* rule in a new manner, applied retroactively. *Schriro*, 542 U.S. at 349. The Court noted that rules which "regulated only the *manner of determining* the defendant's culpability are procedural." *Id.* at 353 (emphasis in original). The Court further noted that *Ring* merely altered the permissible method for determining the appropriate

punishment. *Id.* "Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules. . . ." *Id.* Under this standard, *Ring* created a new procedural rule that did not apply retroactively. *Id.*

Like *Ring*, *Blakely* did not narrow the scope of a criminal statute by interpreting its terms, or alter the range of conduct covered by a criminal statute. *Blakely* also did not place a class of persons beyond the State's power to punish for criminal activity. *Blakely* merely altered the permissible method for determining the appropriate punishment. Like *Ring*, *Blakely* merely allocates the decisionmaking authority from the judge to the jury. Like *Ring*, *Blakely* is a prototypical procedural rule.

The Ninth Circuit, as has every other circuit court to consider the issue, concluded *Blakely* created a new procedural rule that does not fall within the watershed exception. *Schardt*, 414 F.3d at 1036 (quoting *Price*, 400 F.3d at 848-49). The Ninth Circuit correctly determined that a rule transferring the fact finding authority from the judge to the jury does not seriously enhance the accuracy of the fact finding process. *Schardt*, 414 F.3d at 1036. As the Court declared in *Schriro*, "we cannot confidently say that judicial factfinding *seriously* diminishes accuracy." *Schriro*, 542 U.S. at 356. While Burton disagrees with the conclusion reached by the Ninth Circuit in his case, the Ninth Circuit's decision that *Blakely* did not announce a watershed rule is consistent with this Court's decision in *Schriro* and is consistent with the decisions of every circuit court to consider the issue. Review is not necessary.

3. 28 U.S.C. § 2254(d)(1) Prohibits A Grant Of Habeas Relief Based Upon The *Blakely* Rule Because The Rule Was Not Clearly Established Federal Law At The Time Of The State Court Adjudication.

The Antiterrorism and Effective Death Penalty Act prohibits relief on any claim adjudicated on the merits in state court unless the state court decision was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). The phrase clearly established federal law "refers to the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*." *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (emphasis added). Unlike *Teague's* non-retroactivity doctrine, the habeas statute does not provide an exception for retroactive application of new rules. *Cf. Horn v. Banks*, 536 U.S. 266, 272 (2002) (*Teague* analysis distinct from that of 28 U.S.C. 2254(d)). Regardless of whether the new rule is substantive or procedural, the statute bars relief unless the state court adjudication was contrary to or an unreasonable application of clearly established federal law as it existed at the time of the adjudication.

The Court did not issue *Blakely* until several years after the state court adjudication of Burton's claim. Because the *Blakely* rule did not exist at the time of the state court adjudication, the rule was not "clearly established federal law" for purposes of 28 U.S.C. § 2254(d)(1). The state court adjudication could not be either contrary to, or an unreasonable application of *Blakely* since the rule did not exist at the time of the state court adjudication. Thus, 28 U.S.C. § 2254(d)(1) prohibits granting Burton relief based upon the *Blakely* rule.

4. The State Court Adjudication Was A Reasonable Application Of Clearly Established Federal Law As It Existed At The Time Of The Adjudication.

The Ninth Circuit correctly determined the state court adjudication was a reasonable application of clearly established federal law as the law existed at the time of the state court decision. Burton's sentence does not exceed the "statutory maximum" as that term was commonly understood before *Blakely*. In *Apprendi*, the Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Prior to *Blakely*, reasonable jurists consistently understood the term "statutory maximum" as used in *Apprendi* to refer not to the standard range, but to the traditional statutory maximum, *i.e.*, the maximum sentence that could ever be imposed for a particular offense. *See Schardt*, 414 F.3d at 1035 (citing *United States v. Garcia*, 240 F.3d 180, 183-84 (2nd. Cir. 2001); *United States v. Phillips*, 349 F.3d 138, 143 (3rd Cir. 2003); *United States v. Angle*, 254 F.3d 514, 518 (4th Cir. 2001); *United States v. Randel*, 304 F.3d 373, 378 (5th Cir. 2002); *United States v. Hughes*, 369 F.3d 941, 946-47 (6th Cir. 2004); *United States v. Patterson*, 348 F.3d 218, 228-29 (7th Cir. 2003); *United States v. Francis*, 367 F.3d 805, 820 (8th Cir. 2004); *United States v. Jardine*, 364 F.3d 1200, 1209 (10th Cir. 2004)); *see also Simpson*, 376 F.3d at 681; *Penaranda*, 375 F.3d at 243 & n.5 (citing cases); *State v. Gore*, 143 Wash.2d 288, 21 P.3d 267 (2001). Jurists generally agreed *Apprendi* did not address procedures utilized under determinate sentencing laws. The state court conclusion that

Burton's sentence did not violate *Apprendi* was a reasonable application of existing law.

C. ASSUMING *BLAKELY* APPLIES RETROACTIVELY IN THIS PROCEEDING, BURTON'S SENTENCE DOES NOT VIOLATE THE HOLDING IN *BLAKELY*.

Assuming *Blakely* applies retroactively, Burton still is not entitled to relief. The *Blakely* Court simply did not address the issue raised in Burton's challenge to his sentence. The state court adjudication of Burton's claim was not contrary or an unreasonable application of the holding in *Blakely*.

In *Blakely*, the Court held an individual sentence imposed for a single offense violated the Constitution because the individual sentence exceeded the standard sentencing range for that offense. *Blakely*, 542 U.S. at 298-301. *Blakely* did not involve the imposition of consecutive sentences. *State v. Cubias*, 155 Wash.2d 549, 553-54, 120 P.3d 929 (2005); *State v. Senske*, 692 N.W.2d 743, 749 (Minn. Ct. App. 2005); *State v. Abdullah*, 184 N.J. 497, 514, 878 A.2d 746 (2005). *Blakely* did not hold that imposing consecutive sentences where the individual sentences each fell within the standard sentencing range, violates the Constitution. Because *Blakely* did not reach this issue, and did not clearly establish such a rule in a holding of the Court, 28 U.S.C. § 2254(d) bars relief. Even if such a rule is implicit in *Blakely*, and it is not, Burton is not entitled to relief because *Blakely* did not expressly establish the rule in a holding of the Court. *Kane v. Espitia*, 126 S. Ct. 407, 408 (2005).

The individual sentences imposed for each of Burton's offenses do not exceed the statutory standard sentencing range for each individual offense. The court

imposed a standard range sentence for each offense, then ran the standard range sentences consecutive to each other. Running standard range sentences consecutive to each other does not violate the holding in *Blakely*.

Moreover, even if *Blakely* applied to a court's decision to run sentences consecutive to each other, the sentence still does not violate *Blakely*. Increasing a sentence above the statutory maximum sentence is constitutional where the increase is based upon a defendant's criminal history. "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 542 U.S. at 301 (quoting *Apprendi*, 530 U.S. at 490) (emphasis added). In this case, the state court ran the standard range sentences consecutive to each other based on the fact of Burton's convictions.

Under a provision of Washington law, when a defendant is sentenced for two or more current offenses that are not serious violent offenses arising from separate and distinct criminal conduct, the court will run the sentences concurrently. Wash. Rev. Code § 9.94A.589(1)(a) (formerly Wash. Rev. Code § 9.94A.400). This provision is referred to as the multiple offense policy. However, the effect of the multiple offense policy may result in punishment that is "clearly too lenient" for the crimes committed. *State v. Smith*, 123 Wash.2d 51, 55-56, 864 P.3d 1371 (1993). The commission of multiple current offenses, combined with the defendant's high offender score, may result in some of the current offenses going unpunished. *Id.* at 56; Wash. Rev. Code § 9.94A.535(2)(c). The operation of the multiple offense policy, when combined with

a high offender score, results "in 'free crimes' – crimes for which there is no additional penalty." *Smith*, 123 Wash.2d at 56 (quoting *State v. Stephens*, 116 Wash.2d 238, 243, 803 P.2d 319 (1991)). If the sentencing court determines the application of the multiple offense policy would result in "free crimes," the court may impose an exceptional sentence. Wash. Rev. Code § 9.94A.535(2)(c); *Smith*, 123 Wash.2d at 55-56. The court may impose a sentence above the standard range or, as it did in Burton's case, run the standard range sentences consecutive to each other. *Smith*, 123 Wash.2d at 55-56. Running the sentences consecutive to each other is "automatically" proper when concurrent sentences would result in "free crimes" without additional punishment. *Id.* at 56 and 58.

In this case, Burton's convictions for rape, robbery and burglary gave him an offender score of 16. Wash. Rev. Code § 9.94A.525. Burton's offender score placed him over the sentencing grid's top end "9 or more" category. Wash. Rev. Code § 9.94A.510. As a result of his high offender score, the standard range would not increase regardless of the number of crimes Burton had committed. As a result, if the court imposed concurrent sentences, Burton would receive "free crimes" – the commission of crimes without any accompanying punishment. *Smith*, 123 Wash.2d at 56. To avoid rewarding Burton with free crimes, or in other words to avoid not punishing Burton for each one of his crimes, the court ran the individual standard range sentences consecutive to each other. The court imposed the sentence based upon the fact of Burton's convictions.

While the Court has not fully explained the meaning of the phrase "other than the fact of a prior conviction," it is objectively reasonable for a jurist to determine that the basis of Burton's sentence falls within the scope of this phrase. A jurist could reasonably conclude the imposition of consecutive sentences in order to avoid rewarding a defendant for the commission of multiple crimes is based upon the fact of the convictions. *Cf. State v. Cubias*, 155 Wash.2d 549, 552-56, 120 P.3d 929 (2005) (imposition of consecutive sentences did not violate rule in *Blakely*); *State v. Louis*, 155 Wn.2d 563, 572, 120 P.3d 936 (2005) (same); *but see State v. Hughes*, 154 Wash.2d 118, 138-40, 110 P.3d 192 (2005) (holding "free crimes" factor does not fall within *Blakely's* "prior conviction" exception); *State v. Ose*, 156 Wash.2d 140, 148-49, 124 P.3d 635 (2005) (same). The Court has not clearly held that a sentence, imposed to ensure that the defendant is punished for each crime he commits, violates the Constitution. Consequently, Burton is not entitled to relief under 28 U.S.C. § 2254(d).

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III. CONCLUSION

For the reasons stated above, the Court should deny the Petition for Certiorari.

RESPECTFULLY SUBMITTED,

ROB MCKENNA
Attorney General

John J. Samson*
Assistant Attorney General

Paul D. Weisser
Senior Counsel

**Counsel of Record*
PO Box 40116
Olympia, WA 98504-0116
360-586-1445

April 26, 2006

NO. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

LONNIE LEE BURTON,

Petitioner,

v.

DOUGLAS WADDINGTON,
Superintendent, Stafford Creek
Corrections Center

Respondent.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that:

1. On April 26, 2006, the Respondent's Brief in Opposition in the above referenced case was served by mail in accordance with Rule 29.3

2. Three copies of the Respondent's Brief in Opposition were deposited in the United States Mail, with first-class postage prepaid, addressed to Counsel for Petitioner listed on the attached service list.

3. All parties required to be served have been served.

4. I am a member of the Bar of the Supreme Court of the United States

DATED this 26th day of April, 2006.

JOHN J. SAMSON
Counsel of Record
Office of the Washington State Attorney General
Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

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SERVICE LIST

Brian Tsuchida
Counsel for Petitioner
Office of the Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle, WA 98101
(206) 553-1100

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No. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

LONNIE L. BURTON

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Brian Tsuchida
Counsel of Record
Office of the Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle, WA 98101
(206) 553-1100

Laura Mate
Research and Writing Attorney

Counsel for Petitioner

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RCW 9.94A.390(1998) 7

RCW 9.94A.400 (1998) 7

The state does not provide a convincing reason to deny review of the questions presented by Mr. Burton. The cases cited by the state in its attempt to refute the existence of a conflict on whether *Blakely* announces a new rule only demonstrate the confusion that permeates the lower courts on the issue of retroactivity in connection with the *Apprendi/Blakely/Booker* line of cases. The state's argument that the decision below is consistent with this Court's precedent also fails because *Blakely v. Washington,* 542 U.S. 296 (2004) did not redefine the term "statutory maximum."

In addition, although they dominate the response, the state's arguments that Mr. Burton's case provides a poor vehicle for addressing the questions presented are unpersuasive. Contrary to the state's assertions, 28 U.S.C. § 2254(d) does not preclude relief for Mr. Burton, and the district court did not lack subject matter jurisdiction.

A. There is a Conflict About Whether the Holding in *Blakely* is a New Rule.

The lower courts are confused about how to address retroactivity issues arising from the *Apprendi/Blakely/Booker* line of cases and are in conflict on whether *Blakely* announced a new rule.

Of the cases cited by the state as concluding that *Blakely* is a new rule, only two of them actually hold that *Blakely* is a new rule. *See Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005); *United States v. Price*, 400 F.3d 844 (10th Cir. 2005); BIO at 8. Both of these cases are discussed in Mr. Burton's Petition for Certiorari. *Schardt* is the only one addressing a claim under a *statutory* guidelines system. 414 F.3d at 1032-33. In *Price*,

the underlying claim challenges a sentence imposed under the *non-statutory* federal guidelines. 400 F.3d at 846-47. The holding in *Price* that *Blakely* is a new rule suggests that the Tenth Circuit interprets *Blakely* as expanding the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005) as merely applying the rule set forth in *Blakely*.

A third case cited by the state makes no holding about the retroactivity of *Blakely*, but does conclude *Booker* should not apply retroactively. *See Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005). The fourth case, *Simpson v. United States*, does not decide, but only "*assum*[*es*] that the Supreme Court announced a new rule in *Blakely*" and concludes the claim and a successive petition are premature because the Supreme Court has not made *Blakely* retroactive under 28 U.S.C. § 2244(b)(2)(A). 376 F.3d 679, 680-81 (7th Cir. 2004) (emphasis added).

Although the state denies it, the lower courts are in conflict about whether *Blakely* announced a new rule. In conflict with the Ninth Circuit's opinion in *Schardt* and the case below is the Tennessee Supreme Court's opinion in *State v. Gomez*, 163 S.W.3d 632, 649-50 (Tenn. 2005). Examining this Court's analysis and language in *Apprendi*, *Blakely* and *Booker*, rather than relying as the Ninth Circuit has done on lower court opinions about whether *Apprendi* should be applied to the *non-statutory* federal guidelines, the Tennessee Supreme Court concluded *Blakely* did not announce a new rule.

The state correctly points out that the *Gomez* does not hold that *Blakely* applies

retroactively. BIO at 11. Mr. Burton has not suggested it did. The Tennessee Supreme Court, however, did conclude that the holding in *Blakely* is not a new rule. *See Gomez*, 163 S.W.3d at 649-50. The determination that *Blakely* is not a new rule arose in *Gomez* not as part of a *Teague* analysis, but in connection with an application of *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Id.* at 648-50. In *Griffith*, this Court held that new rules must be applied to cases pending on direct review. 479 U.S. at 322-23. *Griffith* and *Teague* are essentially flip sides of the same "new rule" coin. That the issue arose under *Griffith* rather than *Teague* does not diminish the conflict on the identical issue of whether the holding in *Blakely* is a new rule.

Contrary to the state's suggestion, the Tennessee Supreme Court's footnote that *Blakely* likely would not serve as a basis for relief in a collateral proceeding is not inconsistent with its holding that *Blakely* is not a new rule. BIO at 11. The footnote states that under state law, reopening a collateral proceeding would require a claim based on a new rule that applies retroactively. *See Gomez*, 163 S.W.3d at 651 n.16. Since the Tennessee Supreme Court had just concluded that *Blakely* is not a new rule, it is not surprising that court also determined *Blakely* would not provide a basis for state collateral review.

In addition to the Tennessee Supreme Court, the Colorado Court of Appeals has also held that *Blakely* did not announce a new rule. *See State v. Johnson*, 121 P.3d 285, 286-87 (Colo. Ct. App. 2005). The state argues that this is not a legitimate conflict

because the decision will "likely [be] altered by the Colorado Supreme Court. BIO at 11. The state, however, provides no factual basis for this assertion.

B. The Decision Below Contravenes This Court's Precedent.

The state argues that the opinion below is consistent with this Court's precedent. Specifically, the state asserts that the holding in *Blakely* is a new rule because it expanded the definition of "statutory maximum."

In *Apprendi* this Court ruled that the "statutory maximum" was the maximum statutory sentence the defendant could receive "if punished according to the facts in the jury verdict alone." 530 U.S. at 483; *see also id.* at 469. The holding in *Blakely* did not expand that definition. Using almost verbatim language from *Apprendi*, this Court held in *Blakely*: "the statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. at 303. The portion of *Blakely* that was new was the passage that extended beyond the facts of the case and implicated *non-statutory* guidelines:

> When a judge inflicts punishment that the jury's verdict does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Id. at 304. As Mr. Burton's case involves *statutory* mandatory guidelines, it is governed by the holding in *Blakely*, which is not new, but compelled by *Apprendi*.

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C. If *Blakely* Did Announce A New Rule, Whether It Applies Retroactively Is An Issue Of Great Importance.

If *Blakely* is a new rule its retroactivity is an important issue this Court should resolve, and the state does not argue otherwise.

The state argues certiorari is not warranted because this Court and all the circuit courts that have considered the issue decided that *Blakely* did not announce a watershed rule. Its argument, however, ignores that *Blakely* requires not only that a jury rather than a judge make certain fact-findings for sentencing, but also that those facts be proven beyond a reasonable doubt. It is the portion of *Blakely* that requires proof beyond a reasonable doubt that this Court has already made retroactive and is a watershed rule. The state has not provided a persuasive reason not to grant certiorari on this issue.

This Court's decision in *Schriro v. Summerlin*, 543 U.S. 348 (2004) does not answer the question of whether the standard of proof required in *Blakely* applies retroactively. The standard of proof was not at issue in that case.

This Court's jurisprudence establishes that proof beyond a reasonable doubt is a bedrock principle of criminal law and substantially affects the truth-finding function. *See, e.g., Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977); *Ivan V. v. City of New York*, 407 U.S. 203, 204-05 (1972). Whether *Blakely*'s requirement that this standard be applied to certain factual findings at sentencing is a watershed rule is an important issue on which this Court should grant review.

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D. Mr. Burton's Case is An Excellent Vehicle for the Questions Presented.

Due to the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") myriad procedural barriers to federal habeas relief, states are almost always guaranteed an argument that any given habeas case is a poor vehicle for resolving the questions presented. Despite AEDPA's fertile soil, the state fails to provide a persuasive argument that Mr. Burton's case is a poor vehicle for addressing the questions presented.

1. Contrary to the State's Assertion, § 2254(d) Does Not Render This Case a Poor Vehicle to Address the Issues Presented.[1]

The state first argues that "the *Blakely* rule did not exist at the time of the state court adjudication of Burton's claim" and that "[p]rior to *Blakely*, reasonable jurists consistently understood the term 'statutory maximum' as used in *Apprendi* to refer not to the standard range, but to the traditional statutory maximum, *i.e.*, the maximum sentence that could ever be imposed for a particular offense." BIO at 14-15. This argument begs the question of whether the holding in *Blakely* announced a new rule. If, as Mr. Burton argues is the case, the new rule was established in *Apprendi*, not *Blakely*, the state's argument is without merit.

The state's second argument is that even if *Blakely* applies retroactively, 28 U.S.C.

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[1] If the state's argument on the application of 28 U.S.C. § 2254(d) affects this Court's decision on whether to grant Mr. Burton's petition, Mr. Burton requests this Court hold his petition until it has issued an opinion in *Carey v. Musladin*, No. 05-785, a case that likely will further define the parameters of what constitutes clearly established Supreme Court law for purposes of 28 U.S.C. § 2254(d)(1).

§ 2254(d) precludes relief because the sentence on each of the three separate counts of conviction does not exceed the standard range for that count and-"*Blakely* did not involve the imposition of consecutive sentences." BIO at 16. This argument relies on a distinction without a difference.

Mr. Burton's punishment exceeds the maximum sentence the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" and thus violates Mr. Burton's constitutional rights as recognized in *Apprendi* and *Blakely*. By statute, there was a presumption that Mr. Burton's sentences would run concurrently. *See* RCW 9.94A.400 (1998).[2] The presumption was only overcome because the sentencing judge made specific additional findings. *Id*; RCW 9.94A.120 (1998); RCW 9.94A.390 (1998).

To increase Mr. Burton's punishment 258 months beyond the 304 months he would receive if his sentences ran concurrently, the judge applied the exceptional sentence provisions and found that application of the concurrent sentence provision in RCW 9.94A.400 "results in a presumptive sentence that is clearly too lenient." RCW 9.94A.390 (1998). In other words the judge relied on a fact not proven to a jury beyond a reasonable doubt to exceed the statutory maximum sentence available without that

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[2] The statute provides: "Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.120 and 9.94A.390(2)(f) or any other provision of RCW 9.94A.390." RCW 9.94A.400 (1998).

finding. Mr. Burton's exceptional sentence is unconstitutional. As the Ohio Supreme Court recently recognized when addressing consecutive sentences under a similar statutory scheme, "because the total punishment increases through consecutive sentences only after judicial findings beyond those determined by a jury or stipulated to by a defendant, [the consecutive sentence statute] violates principles announced in *Blakely*." *State v. Foster*, 845 N.E. 2d 470, 491 (Ohio 2006).[3]

The state's final argument is that even if consecutive sentences are governed by *Blakely* the judicial fact-finding at issue here, that the imposition of concurrent sentences in this case is "clearly too lenient," is a criminal history finding and not of a type governed by *Blakely*. BIO at 17-19.[4] This argument has been squarely rejected by the Washington Supreme Court. In *State v. Hughes*, the Washington Supreme Court held the "clearly too lenient" provision "is not based solely on the objective determination of the existence of prior convictions; instead, it also requires the conclusion of whether the presumptive sentence calculated is clearly too lenient in light of the other convictions. . . . *Blakely* did not authorize such additional judicial fact finding. The too lenient conclusion is one that must be made by the jury." 110 P.3d 192, 202 (Wash. 2005).

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[3] The state's reliance on *State v. Cubias*, 120 P.3d 929 (Wash. 2005) is misplaced because the imposition of consecutive sentences in that case did not depend on judicial fact-findings.

[4] The state relies on *State v. Smith*, 864 P.2d 1371 (Wash. 1993). *Smith*, however, was specifically overruled on the relevant point by *State v. Hughes*, 110 P.3d 192, 203 (Wash. 2005).

2. The State's Erroneous Argument That the District Court Lacked Subject Matter Jurisdiction is Not a Reason to Deny Certiorari in this Case.

As in the district court and the Ninth Circuit, the state here argues the district court lacked subject matter jurisdiction. And, as both the district court and Ninth Circuit concluded, the state is wrong.

The fact that a petition is second in number does not automatically render it "second or successive" under 28 U.S.C. § 2244. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998). The statute incorporates the abuse of the writ doctrine. *See Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996). Accordingly, the relevant inquiry is not confined to the number of petitions filed, but must also consider whether a petitioner has a "legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

Mr. Burton diligently pursued his appeals and post-conviction proceedings. When Mr. Burton filed his first federal habeas petition in 1998, the judgment on his 1994 conviction was final and all state remedies related to his conviction were exhausted. He diligently filed a habeas petition on those claims in 1998 before the one-year statute of limitations expired. While the habeas petition on his conviction was pending, Mr. Burton diligently pursued his state remedies on the sentence he received at his third re-sentencing in 1998. As soon as he had exhausted state court remedies on his sentencing claim, Mr. Burton, in 2002, filed a second habeas petition raising claims only about his sentence.

The state argues Mr. Burton, in 1998, should have filed a mixed petition and utilized the "stay and abey" procedure to avoid filing a second petition in 2002. In 1998, however, this was not a viable option for Mr. Burton. A Ninth Circuit opinion published in 1998 commented that the "legitimacy of the district court's self-titled 'procedural device of withdrawal and abeyance' presents an important and difficult question of first impression in this Circuit." *Calderon v. United States District Court (Taylor)*, 134 F.3d 981, 983 (9th Cir. 1998). The Ninth Circuit held that it could not say the district court erred in holding the amendment exhausted petition in abeyance, but also indicated that an attempt to re-amend the petition to add previously unexhausted claims might be subject to an abuse of the writ challenge. *Id.* at 988-89. The current stay and abey procedures were not fully approved by the Ninth Circuit until 2001. *See Jackson v. Roe*, 425 F.3d 654, 659 (9th Cir. 2005). Thus, given the state of the law in 1998, Mr. Burton did not fail to raise his sentencing claim at the appropriate time, or, at a minimum, has a legitimate excuse for not filing a mixed petition at that time.

The state also argues that Mr. Burton should have waited until 2002 to file a single petition addressing his conviction and sentencing claims. In 1998, however, it was unclear whether the federal statute of limitations ran from the time the judgment of conviction was final or from the time the judgment on sentence was final. For Mr. Burton to wait was a risky proposition. As the district court below observed:

> Had petitioner waited to file his claims challenging his conviction, he was at risk of losing the opportunity to present

them in 2002 due to the one-year statute of limitations imposed under AEDPA.

The uncertainty over when a judgment becomes final was not clarified in the Ninth Circuit until 2000. *See United States v. Colvin*, 204 F.3d 1221 (9th Cir. 2000). Mr. Burton therefore should also be excused from waiting until 2002 to file a habeas petition.

Under the specific circumstances of this case, Mr. Burton did not abuse the writ of habeas corpus but acted diligently and reasonably. The lower courts correctly concluded Mr. Burton's 2002 petition was not a "second or successive" petition for purposes of § 2244. Accordingly, the state's argument that the district court lacked subject matter jurisdiction is not a reason to deny Mr. Burton's petition for certiorari.

CONCLUSION

The state has not offered a persuasive reason for this Court to deny Mr. Burton's petition for certiorari. For the reasons set forth in his petition, and those addressed in this reply, this Court should grant the petition for a writ of certiorari.

DATED this 5th day of May, 2006.

Respectfully submitted,

Brian Tsuchida
Counsel of Record
Office of the Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle, WA 98101
(206) 553-1100
Counsel for Applicant

(14)

No. 05-9222

Supreme Court, U.S.
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In The Supreme Court of the United States

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

JEFFREY L. FISHER
Counsel of Record
PAMELA S. KARLAN
STANFORD LAW SCHOOL
Supreme Court
Litigation Clinic
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
(650) 723-4426 fax
Counsel for Petitioner

JOHN J. SAMSON
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445
(360) 586-1319 fax
Counsel for Respondent

[Additional Counsel Listed On Inside Cover]

Petition For Certiorari Filed February 10, 2006
Certiorari Granted June 5, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BRIAN TSUCHIDA
LAURA E. MATE
Federal Public Defender
Western District
of Washington
1601 Fifth Ave.
Suite 700
Seattle, WA 98101

THOMAS C. GOLDSTEIN
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

AMY HOWE
KEVIN K. RUSSELL
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Additional Counsel for Petitioner

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 18, 2002 – Burton's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 received by U.S. District Court for Western District of Washington.

November 8, 2002 – Report and Recommendation by U.S. Magistrate Judge dismissing habeas petition.

December 17, 2002 – Order by U.S. District Court adopting the Report and Recommendation and dismissing the habeas petition.

January 7, 2003 – Notice of appeal filed by Burton.

January 9, 2003 – Motion for certificate of appealability filed by Burton in U.S. District Court.

February 7, 2003 – Order by U.S. District Court granting in part and denying in part Burton's motion for certificate of appealability.

March 13, 2003 – Motion for certificate of appealability filed by Burton in the U.S. Court of Appeals for the Ninth Circuit on the issue of whether his sentence violated *Apprendi v. New Jersey*.

June 17, 2003 – Order by Ninth Circuit construing March 13, 2003 motion as a motion for broader certification and denying it. The Order also directed the appointment of counsel for Burton.

November 14, 2003 – Motion to broaden scope of appeal to include the issue of whether his sentence violated *Apprendi v. New Jersey* filed by Burton in the Ninth Circuit.

June 28, 2004 – Order by Ninth Circuit granting Burton's motion to broaden the scope of appeal.

July 28, 2005 – Order by Ninth Circuit affirming the dismissal of the habeas petition.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. LONNIE LEE BURTON, Defendant.	No. 93-1-06948-7 SEA **SECOND AMENDED JUDGMENT AND SENTENCE** (Filed Mar. 16, 1998)

I. HEARING

1.1 The defendant, the defendant's lawyer, MICHAEL SCHWARTZ, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

1.2 The state has moved for dismissal of count(s) _____

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S) The defendant was found guilty on (date). 10/31/94 by jury verdict of:

Count No. I Crime: RAPE IN THE FIRST DEGREE
RCW 9A.44.040(1) Crime Code 00728
Date of Crime 10/18/91 Incident No. _____

Count No. II Crime: ROBBERY IN THE FIRST DEGREE
RCW 9A.56.200(1)(a) Crime Code 02904
Date of Crime 10/18/91 Incident No. _____

Count No.: III Crime: BURGLARY IN THE FIRST DEGREE
RCW 9A.56.020 Crime Code 02304
Date of Crime 10/18/91 Incident No. _____
☐ Additional current offenses are attached in Appendix A.

SPECIAL VERDICT/FINDING(S):

(a) ■ A special verdict/finding for being armed with a Firearm was rendered on Count(s): I, II, III

(b) ☐ A special verdict/finding for being armed with a Deadly Weapon other than a Firearm was rendered on Count(s):

(c) ☐ A special verdict/finding was rendered that the defendant committed the crime(s) with a sexual motivation in Count(s): _____

(d) ☐ A special verdict/finding was rendered for Violation of the Uniform Controlled Substances Act offense taking place ☐ in a school zone ☐ in a school ☐ on a school bus ☐ in a school bus route stop zone ☐ in a public park ☐ in public transit vehicle ☐ in a public transit stop shelter in Count(s): _____

(e) ☐ Vehicular homicide ☐ Violent Offense (D.W. and/or reckless) or ☐ Nonviolent (disregard safety of others)

(f) ☐ Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score (RCW 9.94A.400(1)(a)) are: _____

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

	Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a)	FRAUD	1/9/92	ADULT	10E01 9110 CF 636	INDIANA
(b)	THEFT	1/9/92	ADULT	10E01 9110 CF 636	INDIANA
(c)	FORGERY	5/31/98	ADULT	90-1-6110-4	KING CO.
(d)	RAPE CHILD 2	11/20/92	ADULT	92-1-02798-1	KING CO.

■ Additional criminal history is attached in Appendix B.

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	16	XI	210 to 280 MONTHS	24 MONTHS	234 to 304 MONTHS	LIFE AND/OR $50,000
Count II	10	IX	129 to 171 MONTHS	24 MONTHS	153 TO 195 MONTHS	LIFE AND/OR $50,000
Count III	10	VII	87 to 116 MONTHS	18 MONTHS	105 TO 134 MONTHS	LIFE AND/OR $50,000

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE:

■ *Substantial and compelling reasons exist* which justify a sentence above the standard range for Count(s) I, II, III; to wit: imposing consecutive sentences for Counts I, II and III. In the alternative, substantial and compelling reasons exist which justify a sentence above the standard range for Count I. Findings of Fact and Conclusions of Law are attached in Appendix D. The State ■ did ☐ did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

☐ The Court DISMISSES Count(s) _____.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT (restitution previously ordered):

☐ Defendant shall pay restitution to the Clerk of this Court as previously determined by this court and ordered in Appendix E to the Judgment and Sentence dated 12/19/94 and 1/22/96, or other appropriate order of this court; any said order(s) imposing restitution hereby are incorporated by reference.

☐ Restitution to be determined at future hearing on (Date) _____ at _____.m ☐ Date to be set

☐ Defendant waives presentence at future restitution hearing(s).

~~Defendant shall pay Victim Penalty Assessments pursuant to RCW 7.68.035 in the amount of $100 if all crime(s) date prior to 6-6-06 and $500 if any crime date in the Judgment is after 6-6-06.~~

☐ Restitution is not ordered.

4.2 OTHER FINANCIAL OBLIGATIONS: The Court previously considered the defendant's present and likely future financial resources, and imposes legal financial obligations as previously determined by this court and ordered on 12/19/94 and 1/22/96; the Court's previous rulings regarding the defendant's financial obligations hereby are incorporated by reference.

(a) ☐ $___; Court costs; ☐ Court costs are waived;

(b) ☐ $___, Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104, ☐ Recoupment is waived (RCW 10.01.160);

(c) ☐ $___, Fine; ☐ $1,000, Fine for VUCSA; ☐ $2,000, Fine for subsequent VUCSA; ☐ VUCSA fine waived (RCW 69.50.430);

(d) ☐ $___, Incarceration costs; ☐ Incarceration costs waived (9.94A.145(2));

(e) ☐ $___, Other costs for_____.

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: $_____. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: ☐ Not less than $___ per month; ■ On a schedule established by the defendant's Community Corrections Officer. ☐: _____ The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from the date of

sentence or release from confinement to assure payment of financial obligations.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing, immediately (defendant in custody):

4.4(a) An exceptional sentence is imposed; to wit: the terms set forth in Count I, II and III shall run consecutively to each other, as follows:

304 months on Count I
153 months on Count II
105 months on Count III
562 months total confinement

4.4(b) In the alternative, if for any reason the exceptional, consecutive sentence imposed in ¶ 4.4(a) is invalid, the defendant is sentenced to an exceptional sentence as follows:

506 months on Count I (exceptional sentence)
153 months on Count II
105 months on Count III

ENHANCEMENT time due to special deadly weapon (firearm) finding of 24 months is included for Counts I and II, and 18 months for Count III.

The terms in Counts I, II, III are consecutive. (The terms in Counts I, II, III of the alternative sentence are concurrent.) The sentence herein shall run consecutively to 92-1-02798-1 (King County) and any other cause not referred to in this Judgment.

Credit is given for ☑ all days served ☑ days as determined by the King County Jail and the Department of Corrections solely for conviction under this cause number pursuant to RCW 9.94A.120(15).

4.5 ■ NO CONTACT: For the maximum term of LIFE, defendant shall have no contact with Michael Cramblit, Ray Cramblit, Leslie Cramblit or the Cramblit residence. Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.

4.6 BLOOD TESTING: (sex offense, violent offense) Appendix G is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

4.7 COMMUNITY PLACEMENT, RCW 9.94A.120(9), Community Placement is ordered for any of the following eligible offenses: any "sex offense", any "serious violent offense", second degree assault, any offense with a deadly weapon finding, any CH. 69.50 or 69.52 RCW offense, for the maximum period of time authorized by law. All standard and mandatory statutory conditions of community placement are ordered.

■ Appendix H (for additional conditions) is attached and incorporated herein.

4.8 ☐ WORK ETHIC CAMP: The court finds that the defendant is not eligible for work ethic camp RCW 9.94A.137.

4.9 ■ SEX OFFENDER REGISTRATION (sex offender crime conviction): Appendix J is attached and incorporated by reference into this Judgment and Sentence.

4.10 ☐ ARMED CRIME COMPLIANCE, RCW 9.94A.103,105. The State's plea/sentencing agreement is ☐ attached ☐ as follows: _____

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 3/13/98 Judge /s/ Patricia Aitken

Print Name: Patricia Aitken

Presented by:

/s/ S. O'Toole
Deputy Prosecuting Attorney, WSBA ID #91002

Print Name: S. O'Toole

Approved as to form:

/s/ Michael Schwartz
Attorney for Defendant, WSBA # 11175

Print Name: Michael Schwartz

FINGERPRINTS

[Fingerprints Omitted In Printing]

Defendant's Signature:
/s/ _____

Address CIO Department of Corrections

Right Hand

Fingerprints Of:

Lonnie Burton

Attested By:
M. Janice Michels, Superior Court Clerk
By: /s/ Traci Irvine
Deputy Clerk

TRACI IRVINE

Dated: 3-13-98

/s/ Patricia Aitken
Judge, King
County Superior Court

PATRICIA AITKEN

Certificate

Offender Identification
CC #1384686

I, _____, Clerk of this Court, certify that the above is a true copy of the Judgment And Sentence in this action on record in my office.

S.I. D. No. 13663311
DOB 5-10-65
SEX M
RACE White

Dated:

_____
Clerk

By: _____
Deputy Clerk

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. LONNIE LEE BURTON Defendant,	No. 93-1-06948-7 SEA APPENDIX B JUDGMENT AND SENTENCE – (FELONY) – ADDITIONAL CRIMINAL HISTORY

2.3 The defendant has the following additional criminal history used in calculating the offender score (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
Child Molestation 2	11/20/92	ADULT	92-1-02798-1	KING CO.
Sexual Exploitation of Minor	11/20/92	ADULT	92-1-02798-1	KING CO.

☐ The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.360(II)):

Date: 3/13/98 /s/ Patricia Aitken

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. LONNIE LEE BURTON Defendant,	No. 93-1-06948-7 SEA APPENDIX G ORDER FOR BLOOD TESTING AND COUNSELING

(1) ☑ HIV TESTING AND COUNSELING:

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense committed after March 23, 1988. RCW 70.24.340):

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 296-4848 to make arrangements for the test to be conducted within 30 days.

(2) ☑ DNA IDENTIFICATION:

(Required for defendant convicted of sexual offense or violent offense RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention and/or the State Department of Corrections in providing a blood sample for DNA Identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangement for the test to be conducted within 15 days

If both (1) and (2) are checked, two independent blood samples shall be taken.

Date: 3/13/98 /s/ Patricia Aitken
JUDGE, King County
Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, v. LONNIE LEE BURTON Defendant,	)	No. 93-1-06948-7 SEA APPENDIX H COMMUNITY PLACEMENT

The Court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below.

COMMUNITY PLACEMENT: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after 1 July 1990 to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement:

(1) Report to and be available for contact with the assigned community corrections officer as directed;

(2) Work at Department of Corrections-approved education, employment, and/or community service;

(3) Not consume controlled substances except pursuant to lawfully issued prescriptions,

(4) While in community custody not unlawfully possess controlled substances;

~~(5) Pay community placement fees as determined by the Department of Corrections;~~

(6) Receive prior approval for living arrangements and residence location; and

(7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision or both (RCW 9.94A.120(13))

WAIVER: The following above-listed mandatory conditions are waived by the court: _____

(b) ☐ **OFF-LIMITS ORDER (SODA)**: The Court finds that the defendant is a known drug trafficker as defined in RCW 10.66.010(3) who has been associated with drug trafficking in an area described in Attachment A. Attachment A is incorporated by reference into the Judgment and Sentence and the Court also finds that the area described in Attachment A is a Protected Against Drug Trafficking area (PADT). As a condition of community placement, the defendant shall neither enter nor remain in the PADT area described in Attachment A. _____

(c) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement: _____

(See Attached Special Conditions)

Date: 3/13/98 /s/ Patricia Aitken
JUDGE, King County
Superior Court

SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, v. LONNIE LEE BURTON Defendant.	No. 93-1-06948-7 SPECIAL CONDITIONS OF COMMUNITY PLACEMENT – APPENDIX H –

1. Within thirty days of release from confinement, enter into and make reasonable progress in mental health counseling, and/or sexual deviancy therapy, with a therapist approved by your Community Corrections Officer.

2. Have no contact with any minor-age children without the approval of your Community Corrections Officer and mental health treatment counselor.

3. Consume no alcohol and submit to testing to provide proof of compliance, upon reasonable cause to believe non-compliance.

4. Do not use or possess illegal or controlled substances without the written prescription of a licensed physician and submit to testing and search of your person, residence and vehicle, upon reasonable cause to believe non-compliance.

5. Within thirty days of release from confinement, obtain a substance abuse evaluation and, if deemed appropriate by that evaluation, enter into treatment and not discontinue treatment without the permission of your Community Corrections Officer.

6. Hold no position of authority or trust involving children.

7. Avoid places where children congregate.

8. Do not initiate or prolong physical contact with children for any reason without supervision of guardians or parents with knowledge of this conviction.

9. Do not frequent places where minors are known to congregate without the specific permission of the sexual deviancy counselor or the Community Corrections Officer.

10. Inform the Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved.

11. Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

12. Submit to polygraph and plethyamograph testing upon the request of your therapist and/or Community Corrections Officer, at your own expense and upon reasonable cause to believe there is a violation of conditions 2, 6, 7, 8, 9, 10, 11, and 14 above.

13. Within thirty days of sentencing, submit to DNA and HIV testing as required by law.

14. Do not hold a position as a referee of any sport which involves children.

DATE: 3/13/98

/s/ Patricia Aitken
Judge, King County
Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, v. LONNIE LEE BURTON Defendant.	No. 93-1-06948-7 SEA APPENDIX J JUDGMENT AND SENTENCE – SEX OFFENDER NOTICE OF REGISTRATION REQUIREMENTS

The defendant having been convicted of a sex offense ((a) Violation of Chapter 9A.44 RCW or RCW 9A.64.020 or RCW 9.68A.090 or that is, under Chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes or (b) a felony with a finding of sexual motivation under RCW 9.94A.127, the defendant is hereby notified of sex offender registration requirements of RCW 9A.44 130-140 and is ordered to register with the county sheriff in accordance with the following registration requirements.

REGISTRATION REQUIREMENTS

1. The defendant must register with the Sheriff of the county in Washington state where he resides. When registering, the defendant shall provide the county sheriff with the following: (a) name; (b) address; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) aliases used; (h) social security number; (i) photograph; and (j) fingerprints. The defendants must register immediately upon completion of being sentenced if not sentenced to begin serving a term of confinement immediately upon completion of being sentenced. Otherwise, he must register within 24 hours of

the time of his release if sentenced to the custody of the Department of Corrections, Department of Social and Health Services, a local division of youth services, a local jail, or a juvenile detention facility.

2. If defendant does not now reside in Washington, but subsequently moves to this state, he must register within 24 hours of the time he begins to reside in this state, if at the time of the move he is under the jurisdiction of the Department of Corrections, the Indeterminate Sentence Review board, or the Department of Social and Health Services. If at the time of defendant's move to this state he is not under the jurisdiction of one of those agencies, then he must register within 30 days of the time defendant begins to reside in this state.

3. If defendant subsequently changes residences within a county in this state, he must notify the county sheriff of that change of residence in writing within 14 days prior to the change of residence. If defendant subsequently moves to a new county within this state he must register all over again with the sheriff of the new county and must notify the former county sheriff (i.e. the county sheriff of his former residence) of that change of residence in writing, and defendant must complete both acts within 14 days prior to the change of residence.

4. It is a crime to knowingly fail to register in accordance with the above registration requirements.

I have read and understand these sex offender registration requirements.

/s/ Lonnie Burton
Defendant

Date: 3/13/98

/s/ Patricia Aitken
JUDGE, KING COUNTY
SUPERIOR COURT

Presented by:

/s/ S. O'Toole
Deputy Prosecuting
Attorney

Approved as to form:

/s/ Michael Schwartz
Defense Attorney #11175

SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LONNIE LEE BURTON, Defendant.	NO. 93-1-06948-7 SEA APPENDIX D FINDINGS OF FACT, CONCLUSIONS OF LAW REGARDING IMPOSITION OF EXCEPTIONAL SENTENCE (Filed Apr. 2, 1998)

THE ABOVE-ENTITLED CAUSE came on for sentencing on March 6 and 13, 1998, on the motion of the State pursuant to RCW 9.94A.390 for the imposition of an exceptional sentence. The plaintiff, State of Washington, was represented by Norm Maleng, Prosecuting Attorney for King County, through his deputy, Scott O'Toole. Defendant Lonnie Lee Burton appeared in person and was represented by his attorney, Michael Schwartz.

The Court, having considered the record herein, legal authority cited by the parties and the argument of counsel, and being fully advised in the premises, determines that substantial and compelling reasons exist to impose an exceptional sentence above the standard range, based upon the following:

I. FINDINGS OF FACT

1. On October 31, 1994, the defendant, Lonnie Lee Burton, was found guilty of Rape in the First Degree, Robbery in the First Degree and Burglary in the First

Degree, each committed while armed with deadly weapon, arising out the assault of Michael Cramblit.

2. On October 18, 1991, the defendant went to the Cramblit residence armed with a gun. Michael Cramblit, who was then 15 years old, was at home, alone. Michael answered the front door, where he was confronted by the defendant. After a brief conversation, the defendant drew his weapon and forced his way into the residence.

3. The defendant then forced Michael upstairs into Michael's bedroom. Once there, he forced Michael onto his bed, made him disrobe and then orally and anally raped Michael at gunpoint.

4. The State has moved this Court for an exceptional sentence above the standard range based upon the following:

(a) The "multiple offense policy" of the Sentencing Reform Act, as set forth at RCW 9.94A.390(2)(i) and Washington case authority.

(b) Deliberate cruelty, as set forth at RCW 9.94A.390(2)(a) and Washington case authority.

(c) Sophistication and planning, as provided under Washington law.[1]

Calculating the Defendant's Offender Score

5. In May 1991, the defendant was sentenced to 60 days in jail for Forgery on King County Case No. 90-1-06110-4.

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[1] A fourth possible basis – future dangerousness – was withdrawn by the State at the sentencing hearing on March 6, 1998.

The jail term commenced July 1, 1991, and was completed in August 1991.

6. In approximately August 1991, the defendant was charged in Snohomish County with Rape of a Child in the Third Degree, Case No. 91-1-01109-0, and was held in custody there. When the victim of that crime became unavailable, the defendant was released from custody in early October 1991. The present offenses occurred on October 18, 1991.

7. Later in October 1991, the defendant was arrested in Indiana for offenses occurring there in October 1991.

(a) On January 9, 1992, the defendant was convicted on Clark County (Indiana) Case No. 10E01 9110 CF 636 of Theft and Fraud, both felonies. These matters were not the same criminal conduct because they involved different victims.

(b) The Indiana sentences were imposed concurrently with each other and with a conviction from Floyd County (Indiana) Case No. 22D01 9110 CF 239 for Receiving Stolen Property. The judgment read that it was to "run concurrently with sentences received in Floyd County, Indiana, and in the State of Washington."

8. The defendant subsequently was returned to Washington State and was convicted of Rape of a child in the Third Degree in Snohomish County. He was sentenced on September 2, 1992. That conviction later was reversed on appeal.

9. In April 1992, the defendant was charged with Rape of a Child in the Second Degree, Child Molestation in the Second Degree and Sexual Exploitation of a Minor, King County Case No. 92-1-02798-1.

(a) On October 1, 1992, the defendant pleaded guilty to Rape of a Child in the Second Degree, Child Molestation in the Second Degree and Sexual Exploitation of a Minor. These convictions did not represent "the same criminal conduct."

(b) On November 20, 1992, the defendant was sentenced by the Hon. William Downing to, respectively, 89 months, 102 months and 102 months, each to run concurrently with each other and with the Snohomish County conviction. The Judgment and Sentence expressly stated that . . . "the sentence herein shall run concurrently/ consecutively with the sentence in cause number(s) Sno-Co Cause # [sic] but consecutive to any other cause not referred to in this Judgment."

10. The Indiana sentences imposed on January 9, 1992, were not imposed concurrent with the King County offenses, Case No. 92-1-02798-1, sentenced in November 1992 by Judge Downing. The King County case was not filed until April 1992. The sentence also could not run concurrently with the King County forgery where the jail time was completed in August 1991.

11. The sentence imposed in Case No. 92-1-02798-1 in November 1992 by Judge Downing was concurrent only with the defendant's Snohomish County conviction. It did not run concurrently with the defendant's Indiana convictions.

12. The defendant was sentenced separately to two sets of concurrent sentences: the Indiana convictions and the King County convictions sentenced by Judge Downing. They were not sentenced to run concurrently with each other.

13. At the time of the original sentencing herein, this Court's primary concern regarding treatment of the defendant's prior concurrent sentences was the King

County convictions sentenced by Judge Downing. Those convictions – Rape of a Child in the Second Degree, Child Molestation in the Second Degree and Sexual Exploitation of a Minor – are matters that this Court would never, and has never, counted together as one offense for scoring purposes sexual offenses involving different victims.

14. The defendant's criminal history for purposes of calculating his offender score for Rape in the First Degree thus is as follows:

Offense	**Sentence Date**	**Cause No.**	**Score**
Fraud (Ind.)	1/9/92	10E01 9110 CF 636	1
Theft (Ind.)	1/9/92	10E01 9110 CF 636	1
Rape of Child 2	11/20/92	92-1-02798-1	3
Sex. Expl. Minor	11/20/92	92-1-02798-1	3
Child Mol. 2	11/20/92	92-1-02798-1	3
Forgery	5/31/91	90-1-06110-4	1
Robbery 1	(Count II)	93-1-06948-7	2
Burglary 1	(Count III)	93-1-06948-7	2
Total Offender Score			16

15. The Court therefore finds that at the defendant's offender score for Rape in the First Degree is 16. Including the deadly weapon sentencing enhancement, his standard sentencing range is 234-304 months.

16. The defendant's offender score for Robbery in the First Degree is 10. Including the deadly weapon sentencing enhancement, his standard sentencing range is 153-195 months.

17. The defendant's offender score for Burglary in the First Degree is 10. Including the deadly weapon sentencing enhancement, his standard sentencing range is 105-134 months.

18. If the Court were to sentence the defendant to a standard range sentence on each count, run concurrently, he would receive the same punishment as if he had committed only the Rape in the First Degree. This would effectively result in the "free" crimes of Robbery in the First Degree and Burglary in the First Degree because he would receive no additional penalty for those crimes.

The Defendant's Acts of Deliberate Cruelty

19. The defendant's actions toward the victim at the time of the incident included ordering the victim – a 15 year old boy – to undress; engaging in multiple sexual penetrations – oral rape and anal rape – of the victim; repeatedly threatening to shoot the victim if he resisted him, moved or otherwise did not comply with the defendant; ordering the victim to lie still for 15 minutes following the rape, and threatening to shoot him if he did not comply; ransacking the victim's home such that the victim could hear him as he lay motionless following the rape.

20. When the victim's father arrived home later on the day of the incident, he found his son lying motionless, with his eyes closed, frightened to move because of concern the defendant was still in the house.

Sophistication and Planning

21. The evidence admitted at trial included a letter written by James Martin regarding admissions made by the defendant while both were in custody in Indiana. Mr. Martin wrote a letter to Snohomish County Deputy Prosecuting Attorney Mark Roe, dated March 15, 1992. That letter was admitted at trial as Exhibit 14.

22. Exhibit 14 contains a number of admissions made by the defendant to Mr. Martin, including that the defendant "followed this young boy from school after watching his house on numerous accounts [sic]"; that "he went to his home knowing his parents wouldn't be home"; that "he said he had some season hockey tickets for sale"; that he "asked the boy was anyone of age home, and asked to use the phone and forced his self [sic] in"; that "he told the boy it was 2:35 and to not move until 2:45."

From the foregoing facts, the Court now makes the following:

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the defendant and the subject matter in the above-entitled cause.

2. The sentence imposed herein shall be consistent with the purposes of sentencing under the Sentencing Reform Act (SRA), RCW 9.94A.010, including, but not limited to, ensuring that the punishment imposed is proportionate to the seriousness of the offense and the defendant's criminal history, and that it is commensurate with the punishment imposed on others committing a similar offense.

3. The rape and robbery in the present case were not the "same criminal conduct." The objective intent of each crime was different.

4. Under the burglary anti-merger statute, RCW 9A.52.050, and the authority of *State v. Lessley*, 118 Wn.2d 773 (1992), the Court exercises its discretion to punish the burglary separately.

5. Pursuant to *State v. Bolar,* 129 Wn.2d 361 (1996), this Court must be consistent in its treatment of the defendant's prior convictions for which the defendant received concurrent sentences; i.e., for purposes of calculating the defendant's offender score, the Court either must count the Indiana convictions, as well as the King County convictions, individually and separately *or* the Court must count each group of convictions as one.

6. Had the principles enunciated in *State v. Bolar* been called to the Court's attention at the time of the original sentencing, this Court would have counted the defendant's Indiana convictions separately because they did not involve the same criminal conduct. The Court expressly counts those convictions separately at this time for purposes of calculating the defendant's offender score. The Court also expressly counts the defendant's King County convictions separately at this time for purposes of calculating the offender score.

7. Substantial and compelling reasons exist for imposing an exceptional sentence above the standard sentencing range. Those reasons take into account factors other than those ordinarily considered in computing the presumptive sentencing range for this offense.

8. The defendant's long criminal history, combined with the "multiple offense policy," results in a sentence that is clearly too lenient in light of the purposes of the Sentencing Reform Act. RCW 9.94A.390(2)(i). The fact that the defendant's offender score for Rape in the First Degree is 16 makes the defendant a significantly different offender than one who comes before the Court similarly

convicted of the offenses of which the defendant has been found guilty. Failure to take into account the defendant's offender score of 16 would frustrate the purposes of the SRA.

9. The fact that the defendant's offender score for Rape in the First Degree is 16, thus invoking the "multiple offense policy of the SRA, standing alone, is a substantial and compelling reason and justification for imposing an exceptional sentence herein. RCW, 9.94A.390(2)(i).

10. The actions of the defendant and the prolonged period of degradation of the victim amounted to deliberate cruelty towards the victim. The facts establishing the defendant's deliberate cruelty toward the victim makes the defendant a significantly different offender than one who comes before the Court similarly convicted of the offenses of which the defendant has been found guilty. Failure to take into account his acts of deliberate cruelty would frustrate the purposes of the SRA.

11. The defendant's deliberate cruelty toward the victim, standing alone, is a substantial and compelling reason and justification for imposing an exceptional sentence herein. RCW 9.94A.390(2)(a); *State v. Herzog,* 69 Wn.App. 521, 526-27 (1993); *State v. Talley,* 83 Wn.App. 750, 762-63 (1996); *State v. Franklin,* 56 Wn.App. 915, 918-19 (1989); *State v. Havens,* 70 Wn.App. 251, 254 (1993); *State v. Dunaway,* 109 Wn.2d 207, 219 (1987).

12. The evidence demonstrates that the defendant targeted the victim over an extended period of time, leaning where the victim went to school and where he lived. On the day of the assault, the defendant went to the

victim's home knowing his parents were not there. The defendant's inquiry regarding whether "anyone of age was home" was verification that the victim's parents were absent (i.e., "double checking"). He employed an elaborate scheme to relax the victim's guard and gain access to his home by representing himself to be a salesman of season hockey tickets and then asking to use the telephone.

13. The actions of the defendant demonstrate sophistication and planning of sort that makes the defendant a significantly different offender than one who comes before the Court similarly convicted of the offenses of which the defendant has been found guilty. Failure to take into account the defendant's sophistication and planning would frustrate the purposes of the SRA.

14. The defendant's sophistication and planning in the commission of this crime, standing alone, is a substantial and compelling reason and justification for imposing an exceptional sentence herein.

15. The Court incorporates by reference herein it [sic] oral decision.

16. All the facts considered by the Court in determining that an exceptional sentence is appropriate on the basis of "Deliberate Cruelty" and "Sophistication and Planning" were proven at trial before this Court. At trial, the Court heard, the testimony of James Martin, Ray Cramblit, Michael Cramblit and the defendant, as well as other State's witnesses and the alibi witnesses presented by the defense. The Court also admitted Exhibit 14. The defendant has not identified any *additional* witnesses with

relevant testimony on the issues relevant to the exceptional sentence. Therefore this Court finds a further evidentiary hearing to be unnecessary.

Based upon the foregoing findings of fact and conclusions of law, the Court hereby orders:

ORDER

The plaintiff's motion to impose an exceptional sentence above the standard sentencing range is granted. The original sentence imposed herein is reimposed.

The defendant is hereby sentenced to 304 months in prison for the Rape in the First Degree, 153 months in prison for Robbery in the First Degree, and 105 months in prison for Burglary in the First Degree, *all sentences to run consecutively to each other for a total of 562 months in prison.*

In the alternative, and in the event that the exceptional sentence of consecutive terms on Counts I, II and II [sic] is for any reason invalidated or subsequently found not to be within the order of remand from the Court of Appeals, the defendant is sentenced to an exceptional sentence of 506 months for Rape in the First Degree, 153 months in prison for Robbery in the First Degree, and 105 months in prison for Burglary in the First Degree, all sentences to run concurrently with each other.

All other terms and conditions set forth in the Judgment and Sentence dated March 13, 1998, are incorporated by reference.

DONE IN OPEN COURT this ~~13~~th 31 day of March, 1998.

/s/ Patricia Aitken
PATRICIA H. AITKEN,
Judge

PETITION UNDER 28 USC § 2254 FOR
WRIT OF HABEAS CORPUS BY A PERSON
IN STATE CUSTODY

United States District Court	District Western District of Washington	
Name Lonnie Burton	Prisoner No. 978598	Case No C98-1846C
Place of Confinement Airway Heights Correction Center, Airway Heights, Wash.		
Name of Petitioner (include name under which convicted) Lonnie Burton	V	Name of Respondent (authorized person having custody of petitioner) Kay Walter
The Attorney General of the State of Washington; Christine Gregoire		

PETITION

(Filed Dec. 28, 1998)

1 Name and location of court which entered the judgment of conviction under attack King County Superior Court, Seattle, Wash, 98104. (#93-1-06948-7)

2. Date of judgment of conviction Dec. 16, 1994

3. Length of sentence 562 months

4. Nature of offense involved (all counts) Rape in the first degree; Robbery in the first degree; Burglary in the first degree.

5. What was your plea? (Check one)

(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details

N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☒
(b) Judge only ☐

7. Did you testify at the trial?

Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following

(a) Name of court Washington State Court of Appeals, Division One.

(b) Result Affirmed conviction, reversed sentence.

(c) Date of result and citation, if known June 9, 1997 - 86 Wn. App. 1046

(d) Grounds raised Hearsay, Prosecutorial Misconduct, Other Crimes Evidence, Impeachment with Prior Reversed Sentence, Cumulative Error, Other.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following

(1) Name of court Washington State Supreme Court

(2) Result Petition Denied.

(3) Date of result and citation if known December 2, 1997 – mandate issued 1/16/98 133 Wn.2d 1025

(4) Grounds raised Same as on appeal

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal

(1) Name of court N/A

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10 Other than a direct appeal from the judgment of conviction and sentence have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If you answer to 10 was yes give the following information

(a) (1) Name of court Washington State Court of Appeals, Division One.

(2) Nature of proceeding Personal Restraint Petition.

(3) Grounds raised Ineffective assistance of counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Petition denied.

(6) Date of result June 9, 1997

(b) As to any second petition, application or motion give the same information

(1) Name of court Washington State Court of Appeals, Division One

(2) Nature of proceeding Personal Restraint Petition.

(3) Grounds raised Improper calculation of offender score.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Petition denied.

(6) Date of result June 9, 1997.

(c) Did you appeal to the highest state court having jurisdiction there result of action taken on any petition, application or motion?

(1) First petition, etc Yes ☐ No ☒
(2) Second petition, etc. Yes ☐ No ☒

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not

Felt I had better issues to raise in the direct appeal.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION in order to proceed in the federal court, you must ordinarily first exhaust your available state

court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled

(i) Denial of effective assistance of counsel

(j) Denial of right of appeal

A. Ground one Conviction obtained by use of prior but reversed felony conviction.

Supporting FACTS (state *briefly* without citing cases or law) See Statement of Pertinent Facts attached to Memorandum in Support of Writ of Habeas Corpus.

B Ground two Conviction obtained through denial of compulsory process.

Supporting FACTS (state *briefly* without citing cases or law) See Statement of Pertinent Facts attached to Memorandum in Support of Writ of Habeas Corpus.

C. Ground three Conviction obtained through prosecutorial misconduct and impeachment with innuendo.

Supporting FACTS (state *briefly* without citing cases or law) See Statement of Pertinent Facts attached to Memorandum in Support of Writ of Habeas Corpus.

D. Ground four Cumulative error.

Supporting FACTS (state *briefly* without citing cases or law) See Statement of Pertinent Facts attached to Memorandum in Support of Writ of Habeas Corpus.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☒ No ☐ THE sentence I received at resentencing is on direct appeal.

15. Give the name and address, if known of each attorney who represented you in the following stages of the judgment attacked here in

(a) At preliminary hearing Society of Counsel Representing Accused Persons Seattle, Wash.

(b) At arraignment and plea David Trieweiler, Seattle, Wash.

(c) At trial David Trieweiler, Settle, Wash.

(d) At sentencing Sentence #1: David Trieweiler; Sentence #2: Mark Tackitt, Seattle, Wash.; Sentence #3: Michael Schwartz, Seattle, Wash.

(e) On appeal Eric Broman, Nielsen, Broman & Associates, Seattle, Wash.

(f) In any post-conviction proceeding Pro se

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment in the same court and at the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future _____

(b) Give date and length of the above sentence _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒ But I am simultaneously filing two other writs on another criminal conviction and on a prison disciplinary proceeding.

Wherefore petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding

/s/ _____
Signature of Attorney
(if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

12-23-98
(date)

/s/ Lonnie Burton
Signature of Petitioner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LONNIE L. BURTON,

Petitioner,

v.

KAY WALTER,

Respondent.

Case No.
C.~~99~~ 98-1844L

ORDER

(Filed Apr. 6, 2000)

The Court, having reviewed plaintiff's complaint, the Report and Recommendation of Judge David E. Wilson, United States Magistrate Judge, and the remaining record, does hereby find and ORDER:

(1) The Court adopts the Report and Recommendation;

(2) The petition for writ of habeas corpus is denied; and

(3) This action is dismissed with prejudice

(3) The Clerk is due: to send a copy of this order to counsel of record, the Hon. David E. Wilson.

DATED this 6th day of April, 2000.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	No. 42312-6-I
	DIVISION ONE
v.	UNPUBLISHED
LONNIE BURTON,	OPINION
Appellant.	FILED: JUL 17, 2000

WEBSTER, J. – A jury convicted Lonnie Burton of rape, robbery, and burglary, all in the first degree. The trial court entered a judgment and sentence on December 19, 1994, and amended it a year later after an overturned prior conviction required a new sentence calculation. Because the new sentence invoked the *Pearce*[1] presumption, the Court of Appeals remanded for a proper sentence. Burton appeals his latest sentence essentially arguing that it is a violation of due process and the appearance of fairness doctrine to remand to the same judge presumed vindictive. He also contends that the sentencing court exceeded the scope of remand and erred in imposing consecutive sentences. We affirm because there is no violation of due process or the appearance of fairness doctrine. Also, the sentencing court did not exceed the scope of remand and properly imposed consecutive sentences.

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[1] *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2089, 23 L. Ed. 2d 656 (1969) (presumption of judicial vindictiveness when there is a partially successful appeal and sentence on remand is more severe than original sentence).

FACTS

On October 18, 1991, Lonnie Burton followed M.C., a 15-year-old boy, home from school. According to M.C.'s testimony, there was a knock on the door shortly after he arrived from school. M.C. answered the door and found Burton selling season tickets for a local hockey team. After M.C. declined to purchased the tickets, Burton asked whether he could use the telephone. When M.C. refused, Burton took out his gun and forced his way into the home.

He ordered M.C. to go upstairs and into his bedroom and not look at him. Burton then proceeded to have oral and anal intercourse with M.C by force. After he finished his sexual acts, Burton told M.C. to look at the clock and not move for 15 minutes. Before he left the house, Burton took $160 from the dresser of M.C.'s parents. Later, M.C.'s father arrived and found M.C. still frightened that Burton was in the house. M.C. told his father about the incident and they called the police.

After gathering evidence and searching for witnesses, the police were unable to identify the perpetrator and, a month later, marked the case as inactive. Burton had left Washington for Indiana a few days after the incident. Indiana authorities, however, detained Burton for reasons unrelated to this crime. While in an Indiana jail, Burton told inmate James Martin about the rape of M.C. as well as about a separate rape incident in Snohomish County. Martin wrote a letter to a Snohomish County deputy prosecutor about the two rape incidents.

Burton stood trial in King County Superior Court for the rape of M.C. and for robbery and burglary, all in the first degree. Although the physical evidence was inconclusive, M.C. had identified Burton from a line-up as the one

who most looked like his assailant. In addition, a neighbor picked Burton out of a photomontage and described a car she saw on the date of the incident that closely resembled the car Burton borrowed that week. And, another inmate, one in the Snohomish County jail, was able to recite details of M.C.'s rape that Burton had revealed to him.

A jury convicted Burton of all three charged crimes. About a year after imposing consecutive sentences totaling 562 months, the sentencing court had to recalculate his offender scores because an unrelated prior conviction was overturned. In imposing a new sentence, the sentencing court ran the robbery and burglary convictions *concurrent* with the rape conviction rather than consecutive to each other. Nonetheless, the aggregate sentence still totaled 562 months. In his first appeal, this Court concluded that this sentence was not clearly excessive. But, since Burton was eligible for fewer good time credits than in his original sentence, we presumed vindictiveness following *Pearce* and its progeny.[2] On remand, the sentencing court imposed the same 562-month aggregate sentence but this time ran the three convictions consecutive to each other – rape for 304 months, robbery for 153 months and burglary for 105 months. Burton appeals, again.

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[2] *State v. Burton*, No. 39119-4-I, 1997 WL 306429, at *13-14 (Wn. App. Div. 1 June 9, 1997) (since rape offenses earn less good time than non-rape offenses, the concurrent sentencing was more severe than the original, citing *United States v. Steele*, 988 F.2d 998 (9th Cir. 1993) (parole after serving one-third of sentence was more severe than the original sentence that gave discretion to parole board)), *review denied*, 133 Wn.2d 1025, 950 P.2d 475 (1997).

DISCUSSION

I

Remand to the Same Judge

Burton first argues that it violates due process and the appearance of fairness doctrine for the same judge previously presumed vindictive to enter a new sentence on remand. An appellate court need not consider questions on a subsequent appeal that might have been determined earlier on a previous appeal if properly raised at that time. *State v. Bradfield*, 29 Wn. App. 679, 683, 630 P.2d 494 (1981). Burton did not request remand to a different judge on his previous appeal. He therefore waived this issue. In addition, an appellant may not raise an issue for the first time on appeal if he affirmatively waived it below, even if the issue is of constitutional magnitude. *State v. Valladares*, 99 Wn.2d 663, 671, 664 P.2d 508 (1983). Affirmatively withdrawing a motion constitutes an explicit waiver. *Valladares*, 99 Wn.2d at 672. At the third sentencing hearing, Burton explicitly withdrew his motion to change judges. Consequently, he waived this issue a second time.

Even if Burton had not waived this issue, his argument still fails. Absent personal bias, it is rare to remand sentencing proceedings to a new judge, even after finding a presumption of vindictiveness. *United States v. Rapal*, 146 F.3d 661, 666 (9th Cir. 1998). As discussed later in this opinion, the presumption of vindictiveness arose only because the sentencing judge ran Burton's sentences concurrently instead of consecutively. She did not explicitly increase his aggregate sentence. But, since the rape conviction attached the longest period of incarceration, it restricted his eligibility for good time credits more severely than his previous sentence because rape offenders cannot

earn as much good time as non-rape offenders. RCW 9.94A.150(1). The presumption of vindictiveness was a technical one. Nothing in the record indicates that the sentencing judge, (who was also the trial judge), possessed actual bias towards Burton. Absent a showing of actual bias, we find that it was not necessary for the Court of Appeals to remand to a new sentencing judge.

Nonetheless, the appearance of fairness doctrine requires more than an impartial judge but also requires a judge to appear impartial. *State v. Brenner*, 53 Wn. App. 367, 374, 768 P.2d 509 (1989). The proceeding must appear fair to a reasonably prudent and disinterested person. *Brenner*, 53 Wn. App. at 374. Here, the same judge presided over Burton's third sentencing on remand after the Court of Appeals concluded that the *Pearce* presumption applies. This Court did not find any personal bias on the part of the sentencing judge. Although we restricted the sentencing court from imposing a more severe sentence, we held that the original sentence was not clearly excessive. *Burton*, 1997 WL 306429, at *12-14. The fact that this Court remanded to the same judge to correct a mere technical deficiency should appear fair to a reasonably prudent and disinterested person. We conclude that, even if Burton had not waived this issue, remand to the same judge after finding a *Pearce* presumption does not violate due process or the appearance of fairness doctrine in this case.

II.

Scope of Remand

Next, Burton argues that the sentencing court exceeded its scope on remand and invoked a *Pearce* presumption (again) by imposing the same aggregate

sentence. The *Pearce* presumption arises when the amended sentence is more severe than the original sentence following a partially successful appeal. *Pearce*, 395 U.S. at 723-26. When the sentencing court does not increase the aggregate period of incarceration, the *Pearce* presumption does not arise. *State v. Larson*, 56 Wn. App. 323, 326, 783 P.2d 1093 (1989). Here, the sentencing court did not increase Burton's aggregate sentence.

Nonetheless, the *Pearce* presumption also arises when parole considerations can make the period of incarceration under the amended sentence longer than the original sentence. *See Steele*, 988 F.2d at 998 (parole after serving one-third of sentence was more severe than the original sentence that gave discretion to parole board). Previously on appeal, the Court of Appeals held that Burton's amended sentence was more severe than his original sentence because he was eligible for nearly four years fewer good time credits. *Burton*, 1997 WL 306429, at *14. This was so because the amended sentence ran concurrently so that the entire period of incarceration followed the 562-month rape sentence which limits good time to 15 percent of the term as opposed to one-third for non-rape offenses. RCW 9.94A.150(1). After the appeal, however, the sentencing court imposed consecutive sentences (562 months total) that allow Burton the opportunity to earn good time credits as favorably as in his original sentence. Burton will be able to reduce his sentences for robbery (105 months) and burglary (153 months) by up to one-third each and reduce his rape sentence (304 months) by 15 percent RCW 9.94A.150(1). He is eligible to earn early release time in segments adding up to a total of 131.60 months as opposed to 130.74 months in the original sentence. *Burton*, 1997 WL 306429, at *14. His new

sentence is slightly less severe than his original sentence. Accordingly, the *Pearce* presumption does not apply and the sentencing court did not exceed the scope of remand.

Burton further argues that the trial court exceeded the scope of remand in recalculating his offender scores. Generally, the law of the case doctrine would make the offender score binding in subsequent appeals. *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905, (1996). Except, the doctrine is discretionary when controlling law changes between the appellate decision and proceedings on remand. *Coffel v. Clallam County*, 58 Wn. App. 517, 521, 794. P2d 513 (1990). Before Burton's third sentencing hearing, the Washington Supreme Court held that under RCW 9.94A.360(6), a sentencing court may not count some concurrently-served prior convictions as one offense and count others separately. *State v. Bolar*, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996). Rather, the sentencing court must count concurrently served prior convictions as one offense or each as separate offenses. *Bolar*, 129 Wn.2d at 366. Since the Washington Supreme Court made this ruling before the third sentencing hearing, the sentencing court was correct in recalculating Burton's offender score for rape as follows:

Offense	Sentence Date	Cause No.	Score
Forgery	5/31/1991	90-1-06110-4	1
Fraud (Indiana)	1/9/1992	10E01 9110 CF 636	1
Theft (Indiana)	1/9/1992	10E01 9110 CF 636	1
Sexual Exploitation of a Minor	11/20/1992	92-1-02798-1	3

Child Molestation 2	11/20/1992	92-1-02798-1	3
Rape of Child 2	11/20/1992	92-1-02798-1	3
Robbery 1	(Count II)	93-1-06948-7	2
Burglary 1	(Count III)	93-1-06948-7	2
Offender Score for Rape			16

Following *Bolar*, the court properly added Burton's offender score for rape after counting his concurrently served prior convictions as separate offenses.[3] Therefore, the court did not exceed the scope of remand.

III.

Multiple Offense Policy

Burton challenges the sentencing court's decision to run his robbery and burglary sentences consecutively as an exceptional sentence. A court may impose an exceptional sentence if it finds substantial and compelling reasons to justify the sentence. *State v. Smith*, 123 Wn.2d 51, 55, 864 P.2d 1371 (1993) (citing RCW 9.94A.120(2)). To reverse an exceptional sentence, an appellate court must find that either (1) the record does not support the judge's reasons for imposing the exceptional sentence or (2) that the judge's reasons themselves do not justify the exceptional sentence. RCW 9.94A.210(4)(a). The first inquiry is a question of fact while the second inquiry is a question of law. *Smith*, 123 Wn.2d at 55. As to the factual inquiry, we have already determined above that the record supports

[3] The sentencing court also recalculated Burton's offender scores for robbery and burglary.

the offender score of 16 for rape – the reason for imposing the exceptional sentence.

As to the question of law, the multiple offense policy justifies the exceptional sentence. If the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is "clearly too lenient," the sentencing court may consider that as an aggravating factor for imposing an exceptional sentence. RCW 9.94A.390(2)(i), formerly RCW 9.94A.390(2)(g)(1991); *Smith*, 123 Wn.2d at 55. This is automatically proper when the presumptive sentence would result in "free" crimes – crimes without additional punishment. *Smith*, 123 Wn.2d at 55-56. A sentencing court may remedy a sentence that is "clearly too lenient by lengthening concurrent sentences and/or by imposing consecutive sentences. *Smith*, 123 Wn.2d at 57-58. In *Smith*, the Washington Supreme Court found an exceptional sentence (containing both lengthened and consecutive sentences) justified when the defendant had an offender score of 10 for multiple offenses. *Smith*, 123 Wn.2d at 56. Since the defendant's offender score of 10 placed him one point over the sentencing grid's "9 or more" category and because each second-degree burglary conviction counts for two points, he received one-half of a "free" crime. *Smith*, 123 Wn.2d at 56. Therefore, the sentencing court properly found his sentence as "clearly too lenient" and correctly imposed exceptional consecutive sentences.

Here, the sentencing court identified the multiple offense policy and Burton's offender score of 16 for rape as the basis for running the sentences for first degree robbery and first degree burglary consecutively. Substantial evidence supports the calculation of Burton's offender scores. The sentencing court found that running the standard sentences for those crimes concurrently would be

"clearly too lenient" because first degree robbery and first degree burglary would be free crimes with no additional penalty: "If the Court were to sentence the defendant to a standard range sentence on each count, run concurrently, he would receive the same punishment as if he had committed only the Rape in the First Degree." Clerk's Papers (CP) at 264. Burton's offender score of 16 placed him seven points over the sentencing grid's "9 or more" category. And, because the first degree robbery and first degree burglary convictions count for three points each, Burton would have received at least two free crimes with concurrent sentencing. The court here properly imposed consecutive standard sentences to avoid at least two free crimes.

IV. Aggravating Factors

Next, Burton argues that the sentencing court erred in considering additional aggravating factors on remand.[4] Specifically, the court found "sophistication and planning" as an aggravating factor at the third sentencing but had not made such a ruling when raised at an earlier sentencing hearing. Also, the court found "deliberate cruelty" when raised by the State for the first time at the third sentencing. Nonetheless, the sentencing court concluded that the multiple offense policy alone justified the exceptional sentence: "The fact that the defendant's offender score for Rape in the First Degree is 16, thus invoking the

[4] Courts can consider new *mitigating* factors when directed to do so by an appellate court. *State v. Ha'mim*, 132 Wn2d 834, 848, 940 P2d 633 (1987). But, there is no clear answer in the case law on the precise question presented here because the Court of Appeals did not direct the sentencing court to address additional aggravating factors to justify the exceptional sentence.

'multiple offense policy' of the [Sentencing Reform Act], *standing alone*, is a substantial and compelling reason and justification for imposing an exceptional sentence herein." CP at 268 (emphasis added). The court had cited the multiple offense policy at earlier sentencing hearings. Because the sentencing court did not rely on the additional aggravating factors for imposing an exceptional sentence, we find no error.

V. Other Sentencing Issues

Burton also challenges the sentencing court's authority to impose an alternative sentence. We do not question the court's authority because the alternative sentence is invalid on other grounds. Under the alternative sentence that ran concurrently with the rape conviction, Burton could earn only 75.90 months of good time credits as opposed to 130.74 months in his original sentence. RCW 9.94A.150(1); *Burton*, 1997 WL 306429, *14. Because the alternative sentence made Burton eligible for fewer good time credits than his original sentence, the *Pearce* presumption applies. *See Steele*, 788 F.2d at 998. The alternative sentence, therefore, violates the order of remand mandating a less severe sentence. We vacate the alternative sentence.

Burton asks the Court of Appeals to remand to a different judge upon vacation of his sentence. Because we do not vacate his enforced sentence, but only vacate the alternative sentence, there is no need for remand. Even if remand were necessary, without a showing of actual vindictiveness or personal bias, the law does not require remand to a different judge. *Rapal*, 146 F.3d at 666.

To preserve federal review, Burton asks whether his 562-month sentence for rape, robbery and burglary, and his 506-month alternative sentence, are clearly excessive. In Burton's previous appeal, this Court ruled that the 562-month sentence is not clearly excessive given the crimes he committed. *Burton*, 1997 WL 306429, *12-13. We need not readdress this issue. And, because we vacate the 506-month alternative sentence for reasons above, we do not address whether the alternative sentence is excessive.

Finally, in his pro se brief, Burton argues that the Interstate Agreement on Detainers (IAD) mandates that his Indiana sentences be concurrent with his Washington sentences. Because the Washington Supreme Court has held that the IAD does not apply to sentencing proceedings, Burton's argument fails.

State v. Barefield, 110 Wn.2d 728, 729-30, 756 P.2d 731 (1988). The trial court was correct in refusing to apply the IAD to this situation.

We affirm.

/s/ Webster, J

WE CONCUR

/s/ Ellington, J

/s/ Grosse, J

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LONNIE L. BURTON, Petitioner	NO 70036-2 **ORDER** C/Ā NO. 42312-6-I

Department II of the Court considered this matter at its December 5, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of December, 2000.

/s/ Richard P. Guy
CHIEF JUSTICE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L BURTON, *Petitioner,* v. DOUG WADDINGTON, *Respondent.*	CASE NO. C02-140L REPORT AND RECOMMENDATION

(Filed Nov. 8, 2002)

INTRODUCTION

Petitioner Lonnie L. Burton is a state prisoner currently incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington. He seeks relief under 28 U.S.C. § 2254 from a 562-month sentence, resulting from his 1994 King County Superior Court conviction on charges of first degree rape, first degree robbery and first degree burglary, with a weapon enhancement on all three. (Dkt. 3.) Specifically, petitioner challenges the 1998 resentencing for his 1994 conviction, but not the underlying conviction. After careful consideration of the record, the Court concludes that no evidentiary hearing is required, and that the Court should deny petitioner's § 2254 petition and dismiss this action with prejudice.

FACTUAL AND PROCEDURAL HISTORY

The Court of Appeals for the State of Washington summarized the facts of petitioner's case as follows:

On October 18, 1991, Lonnie Burton followed M.C., a 15-year-old boy, home from school. According to M.C.'s testimony, there was a knock on the door shortly after he arrived from school. M.C. answered the door and found Burton selling season tickets for a local hockey team. After M.C. declined to purchase the tickets, Burton asked whether he could use the telephone. When M.C. refused, Burton took out his gun and forced his way into the home

He ordered M.C. to go upstairs and into his bedroom and not look at him. Burton then proceeded to have oral and anal intercourse with M.C. by force After he finished his sexual acts, Burton told M.C. to look at the clock and not move for 15 minutes. Before he left the house, Burton took $160 from the dresser of M.C.'s parents. Later, M.C.'s father arrived and found M.C. still frightened that Burton was in the house. M.C. told his father about the incident and they called the police.

After gathering evidence and searching for witnesses, the police were unable to identify the perpetrator and, a month later, marked the case as inactive. Burton had left Washington for Indiana a few days after the incident. Indiana authorities, however, detained Burton for reasons unrelated to this crime. While in an Indiana jail, Burton told inmate James Martin about the rape of M.C. as well as about a separate rape incident in Snohomish County. Martin wrote a letter to Snohomish County deputy prosecutor about the two rape incidents.

Burton stood trial in King County Superior Court for the rape of M.C. and for robbery and burglary, all in the first degree. Although the

> physical evidence was inconclusive, M.C. had identified Burton from a line-up as the one who most looked like his assailant. In addition, a neighbor picked Burton out of a photomontage and described a car she saw on the date of the incident that closely resembled the car Burton borrowed that week. And, another inmate, one in Snohomish County jail, was able to recite details of M.C.'s rape that Burton had revealed to him.
>
> A jury convicted Burton of all three charged crimes About a year after imposing consecutive sentences totaling 562 months, the sentencing court had to recalculate his offender scores because an unrelated prior conviction was overturned. In imposing a new sentence, the sentencing court ran the robbery and burglary convictions *concurrent* with the rape conviction rather than consecutive to each other. Nonetheless, the aggregate sentence still totaled 562 months. In his first appeal, [the Court of Appeals] concluded that this sentence was not clearly excessive. But, since Burton was eligible for fewer good time credits than in his original sentence, [the Court] presumed vindictiveness following *Pearce* and its progeny.

(Dkt. 12, Exh. 2 at 2-4 (emphasis in original) (footnotes omitted).) The Supreme Court for the State of Washington denied review of the Court of Appeals' decision on December 3, 1997 (Dkt. 3 at 3.)

On remand, the sentencing court imposed the same 562-month aggregate sentence, but this time ran the three convictions consecutive to each other – rape for 304 months, robbery for 153 months and burglary for 103 months. (Dkt. 12, Exh. 1.) The Superior Court entered this second amended judgment and sentence on March 16,

1998. Petitioner again appealed to the Court of Appeals for the State of Washington.

While that appeal of the re-sentencing was pending in state court, petitioner filed a habeas petition in this court on December 28, 1998, challenging the 1994 conviction. (*Id.*, Exh. 5.) This Court consolidated the 1998 petition with another petition that had been filed earlier under Case No. C98-1844L. The Court ultimately denied the consolidated petition with prejudice (*Id.*, Exh. 6.) The Ninth Circuit affirmed the decision in an unpublished opinion *Burton v. Walter,* No. 00-35579, 2001 WL 1243655 (9th Cir. May 30, 2001), *cert. denied,* 122 S. Ct. 1923 (2002).

On July 17, 2000, the Court of Appeals for the State of Washington affirmed petitioner's sentence. (Dkt. 12, Exh. 2.) The Supreme Court for the State of Washington denied review on December 5, 2000. (*Id.*, Exh. 4.) Petitioner then filed a personal restraint petition ("PRP") in the Supreme Court, which raised an *Apprendi* challenge to his sentence. *See In re Burton,* Supreme Court Cause No. 72010-0.

On January 18, 2002, petitioner filed the instant habeas petition. (Dkt. 3.) On the same date, petitioner lodged a motion to stay the proceedings pending the resolution of his PRP in the state courts. (Dkt. 4.) The PRP was denied, and, on April 2, 2002, petitioner's Motion to Modify the Commissioner's Ruling was also denied. (*See* Dkt. 13 at 18.) On April 11, 2002, the Court ordered a response to petitioner's habeas petition and motion to stay. (Dkt. 5.) As a part of the response, respondent was directed to state whether petitioner had exhausted available state remedies and whether the action may properly be

stayed pending a decision by the state Supreme Court on petitioner's PRP. (*Id.* at 2.)

On May 4, 2002, respondent filed a response to the motion to stay the proceedings. (Dkt. 7.) Respondent conceded that petitioner's claims have been exhausted, but asserted that this Court lacks subject matter jurisdiction over the petition because petitioner failed to obtain permission from the Ninth Circuit Court of Appeals to file the petition as required under 28 U.S.C. § 2244(b)(3)(A) for "second or successive" habeas actions.[1] Respondent thus argued that the Court should deny the motion to stay the petition. (*Id.* at 2.) Alternatively, respondent argues that petitioner's motion to stay should be denied because the petition constitutes an abuse of the writ as petitioner could have raised the claims in his previous 1998 petition. (*Id.* at 3.) Petitioner filed a reply on May 13, 2002, arguing that his current challenge was not exhausted in 1998 and, therefore, could not have been brought with his previous claims. (Dkt. 8.)

The Court was not convinced that petitioner's habeas action should be dismissed for lack of subject matter jurisdiction, and ordered respondent to file an Answer to the habeas petition which specifically addressed the issue of "second or successive petitions," as well as whether

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[1] In Case No. C98-1844L, petitioner challenged the sentence in a different case: his 1992 convictions of second degree rape of a child, second degree child molestation and second degree exploitation of a minor. (*See* Case No. C98-1844L, Dkt. 2.) In Case No. C98-1846L, petitioner challenged specific evidence admitted during the 1994 trial in this case, which resulted in convictions of first degree rape, first degree robbery and first degree burglary. (*See* Case No. C98-1846L, Dkt. 2.) The 1994 convictions underlie petitioner's exceptional sentence which he challenges in the instant habeas action.

petitioner's sentencing claims were ripe at the time he filed his first habeas petition. (Dkt. 10.)

On August 16, 2002, respondent filed an Answer and Memorandum of Authorities. (Dkt. 11.) On September 5, 2002, petitioner filed his Response. (Dkt. 13.) The briefing is now complete and the petition is ripe for review.

GROUNDS FOR REVIEW

In his habeas petition, petitioner alleges that his due process rights were violated in four respects when: (1) the trial court improperly increased his offender score at sentencing; (2) the trial court imposed an exceptional sentence based on aggravating factors that were either previously rejected or not offered; (3) the trial judge was actually vindictive against him; and (4) the sentence petitioner received which was in excess of the top range set by statute was based on factors not submitted to a jury nor proved beyond a reasonable doubt. (Dkt. 3 at 5-6.)

DISCUSSION

Exhaustion

It is well established that state remedies must first be exhausted on all issues raised in a federal habeas corpus petition. *Rose v. Lundy,* 455 U.S. 509 (1982); 28 U.S.C. § 2254(b), (c). Exhaustion must be shown either by providing the highest state court with the opportunity to rule on the merits of the claim or by showing that no state remedy remains available. *Johnson v. Zenon,* 88 F.3d 828, 829 (9th Cir. 1996). Respondent concedes that petitioner has

exhausted his habeas corpus claims and, thus, habeas review is appropriate.[2] (Dkt. 11 at 4); *see also Gray v. Netherland,* 518 U.S. 152, 162-63 (1996) (discussing the exhaustion doctrine).

Standard of Review

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the U.S. Supreme Court on a question of law, or if the state court decides a case differently than the U.S. Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor,* 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The Ninth Circuit has interpreted "an unreasonable

[2] Petitioner initially moved to stay the habeas proceeding while he pursued an *Apprendi* claim by way of PRP in the Supreme Court for the State of Washington (Dkt. 4.) However, the PRP has since been denied and respondent concedes exhaustion of all claims. Thus, petitioner has now withdrawn his motion to stay. (Dkt. 13 at 7.)

application of law" to mean an application that is "clearly erroneous." *Van Tran v. Lindsey,* 212 F.3d 1143, 1152-54 (9th Cir.), *cert. denied,* 531 U.S. 944 (2000).

In addition, if a habeas petitioner challenges the determination of a factual issue by a state court, such determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Second or Successive Petitions

Respondent initially contends that this Court lacks jurisdiction to review petitioner's habeas claims because petitioner has failed to obtain permission from the Ninth Circuit Court of Appeals to file a "second or successive" petition as mandated by 28 U.S.C § 2244(b)(3)(A). (Dkt. 11 at 6.) Respondent argues that the instant petition is "second or successive" because petitioner's current sentencing claim was ripe at the time he filed his 1998 habeas petition, and therefore, he should have either raised it at that time, or he should have waited to file a petition until his sentencing claim was exhausted.[3] (Dkt. 11 at 6-8.) Respondent concludes that because petitioner chose to file a habeas petition in 1998 that did not include the current sentencing claim, he cannot return to federal court to pursue relief now without first satisfying 28 U.S.C. § 2244(b). (*Id.* at 9.)

[3] It is not clear to the Court how respondent determined petitioner's claim to be both "ripe for review" and "unexhausted" at the same time. (*See* Dkt. 11 at 8-9.)

Petitioner answers that while his claims challenging his conviction were ripe for review in 1998, and were at risk of being precluded by the statute of limitations if not filed at that time, his current sentencing challenge was not ripe because it had not yet been exhausted in the state courts. (Dkt. 13 at 7.) Petitioner further argues that, in fact, at the time he filed the challenges to his conviction in this Court, he had just been re-sentenced for a third time and he had filed a direct appeal in the Court of Appeals for the State of Washington; therefore, it would have been Improper to raise the sentencing claim in 1998. (*Id.* at 7-8.) Petitioner also contends that he could not have waited until his sentencing appeal had been exhausted before filing his challenge to the underlying conviction, as the conviction had been affirmed on appeal in the state courts, and any claim challenging that conviction in federal court would have expired in January 1999. (*Id.* at 7.) For the following reasons, the Court agrees.

As a threshold matter, the Court finds that petitioner's current sentencing claim was not ripe for review at the time he filed his first habeas petition in 1998. Indeed, the parties agree that petitioner had not exhausted the claim in the state courts at the time of filing, and therefore, this Court could not have reviewed it. (*See* Dkt. 11 at 8-9.) Thus, had petitioner raised the claim in 1998, he would have presented a "mixed petition," which would have necessarily been dismissed by this Court until his sentencing claim was exhausted. *See Rose, supra.* Yet, this is exactly the scenario that respondent asserts should have occurred. (*Id.* at 6.) Respondent then concedes that had petitioner raised the sentencing claim in his first petition, and had the Court then dismissed the petition without reaching the merits, petitioner would not now be

filing a "second or successive" petition, as supported by *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998) (holding that a claim previously dismissed as premature does not qualify as "second or successive" for Antiterrorism and Effective Death Penalty Act's ("AEDPA") purposes), and *LaGrand v. Stewart,* 170 F.3d 1158 (9th Cir. 1999) (holding that petitioner was not required to obtain leave to file a second or successive habeas petition where that claim was not ripe at the time of petitioner's first habeas petition). (Dkt. 11 at 7.)

The Court finds respondent's argument to be misguided. A previously filed habeas petition does not necessarily render a subsequent petition "second or successive." *See Hill v. Alaska*, 297 F.3d 895 (9th Cir. 2002). In *Hill,* the Ninth Circuit stated that since "AEDPA does not define the terms 'second or successive[,]' [t]he Supreme Court, the Ninth Circuit, and our sister circuits have interpreted the concept incorporated in this term of art as derivative of the 'abuse-of-the-writ' doctrine developed in pre-AEDPA cases." *Hill*, 297 F.3d at 897-98 (citations omitted). In *McCleskey v. Zant,* 499 U.S. 467 (1991), the Supreme Court explained that "the abuse-of-the-writ doctrine . . . [has] concentrate[d] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *Id.* at 490. In the instant case, petitioner did not raise the challenge to his sentence in his 1998 petition because he knew to do so would be futile (*See* Dkt. 13 at 8-9.) The claim was pending on direct appeal in the state courts and therefore this Court could not have reviewed it. Although petitioner had been sentenced, and arguably had the facts available on which to base a claim in his first habeas petition, he was precluded by law from properly raising it until the state

courts' final decisions had been rendered. It was not until 2000 that the sentencing court's decision became final. (Dkt. 12, Exh. 4.) It would be illogical to require petitioner to preserve his sentencing claim by raising it before it was ripe for review (and quite possibly moot depending on the outcome in the state appeals court), only to result in this Court dismissing the claim as unexhausted, just so that he could later bring a second habeas petition without leave of the Ninth Circuit.

Respondent argues alternatively that petitioner should have waited to file all of his claims until after his sentence became final in December 2000. (Dkt. 11 at 8-9.) This, too, is misguided. Had petitioner waited to file his claims challenging his conviction, he was at risk of losing the opportunity to present them in 2002 due to the one-year statute of limitations imposed under AEDPA. Arguably, petitioner's conviction became final on June 9, 1997, when the Court of Appeals for the State of Washington affirmed his conviction but overturned his sentence. (Dkt.. 12, Exh. 3.) His case was remanded to the trial court solely for the purpose of re-sentencing. While petitioner continued to challenge his new sentence on direct appeal, his claims challenging the conviction had been exhausted. In fact, this Court, in reviewing petitioner's 1998 petition, agreed that his claims were ripe for review. (*See* Case No. C98-1844L, Dkt. 38.) This Court determined that the properly exhausted claims should be addressed on the merits, and subsequently denied them as without merit. (*See id.* at 16.) Thus, this Court apparently agreed that petitioner's conviction was final and ripe for review, despite the pending appeal of his sentence.

In *Martinez-Villareal, supra,* the Supreme Court addressed the situation where a petitioner has raised a

claim in his first petition, which is then dismissed by the District Court as premature, and then is raised later in a second habeas petition when it becomes ripe for review. *Martinez-Villareal,* 523 U.S. at 643. In that case, the government argued that because the petitioner had already raised the claim in his first petition, he must obtain leave from the Circuit Court before proceeding with a second habeas challenge. *Id.* The Court rejected the argument, stating that "[i]f [the government's] interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse." *Martinez-Villareal,* 523 U.S. at 644. While the Court limited its holding to cases where a claim has been previously raised, dismissed as premature, and then re-raised, this Court finds that the same reasoning applies to the instant case. *See Martinez-Villareal,* 523 U.S. at 645 n.*.

In both situations, the petitioner has not received an adjudication of his claim by the federal court. The *Martinez-Villareal* Court recognized the necessity of exhausting claims in the state courts before allowing habeas review. The holding was grounded on the fact that petitioner's claim was premature and could not be heard by the federal court in his first petition, not on the fact that he had given notice to the Court by raising it once prematurely and then raising it a second time when it was ripe. *See Martinez-Villareal,* 523 U.S. at 644-45. Although the Court also stated that the *Martinez-Villareal* case did not present a situation where a petitioner was raising a claim for the first time in a second petition, as is the instant case, the Court did not say this situation would result any differently *Martinez-Villareal,* 523 U.S. at 645 n.*. Rather, the Court stated that it "ha[d] no occasion to decide whether

such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." *Id.*

Finally, in *LaGrand, supra,* the Ninth Circuit held that a petitioner is not required to obtain leave from the Ninth Circuit to file what is "functionally" a first petition as to a previously unripe claim *LaGrand,* 170 F.3d at 1160. Again, respondent argues that this case does not apply to the instant situation because petitioner is raising a new claim for the first time, and *LaGrand* involved a petitioner who had raised the claim in his first petition, the Court dismissed it as unripe, and then the petitioner raised it again when it became ripe. (Dkt. 11 at 7-8.) The Court finds this difference to be immaterial. In *Hill, supra,* the Ninth Circuit recognized that the term "second or successive" did not apply "if the [petitioner] did not have an opportunity to challenge the state's conduct in a prior petition." *Hill,* 297 F.3d at 898. Here, petitioner did not have the opportunity to challenge his sentence in 1998 because his sentencing claim was not ripe for review as respondent asserts. Moreover, as discussed above, petitioner could not have waited to file his 1998 petition or he would have risked losing the opportunity to challenge his underlying conviction. Therefore, the Court finds that the instant habeas petition is not "second or successive," and thus, does note require leave under 28 U.S.C. § 2244(b) to pursue the claim on the merits.

Claims One, Two and Three – Improper Increase in Offender Score/Vindictiveness

Petitioner first claims that his due process rights were violated when the sentencing court improperly increased his offender score at his third re-sentencing in order to justify imposing an exceptional sentence (Dkt. 3 at 5.)

Petitioner argues that his three previous King County convictions should have been merged for sentencing purposes, but that instead, the sentencing judge, with actual vindictiveness, chose to un-merge all prior convictions in order to continue to impose an exceptional sentence. (Dkt. 13 at 9-10.) Petitioner concludes that had the sentencing judge merged all prior convictions, his offender score would have been 9 instead of 16, and therefore, his sentence would have been less severe. (*Id.* at 15.) Petitioner also argues that the trial court imposed an exceptional sentence based on aggravating factors that were either previously rejected or not offered. (Dkt. 3 at 5.) Respondent answers that the state courts reasonably denied petitioner's claims because the Superior Court properly sentenced petitioner under Washington law, and because petitioner has failed to prove actual vindictiveness. (Dkt. 11 at 11.)

In denying petitioner's first claim, the Court of Appeals for the State of Washington stated:

> Burton argues that the sentencing court exceeded its scope on remand and invoked a *Pearce* presumption (again) by imposing the same aggregate sentence. The *Pearce* presumption arises when the amended sentence is more severe than the original sentence following a partially successful appeal. *Pearce,* 395 U.S. at 723-26. When the sentencing court does not increase the aggregate period of incarceration, the *Pearce* presumption does not arise. *State v. Larson,* 56 Wn. App. 323, 326, 783 P.2d 1093 (1989). Here, the sentencing court did not increase Burton's aggregate sentence
>
> Nonetheless, the *Pearce* presumption also arises when parole considerations can make the

period of incarceration under the amended sentence longer than the original sentence. *See Steele,* 988 F.2d at 998 (parole after serving one-third of sentence was more severe than the original sentence that gave discretion to parole board). Previously on appeal, the Court of Appeals held that Burton's amended sentence was more severe than his original sentence because he was eligible for nearly four years fewer good time credits. *Burton,* 1997 WL 306429, at *14. This was so because the amended sentence ran concurrently so that the entire period of incarceration followed the 562-month rape sentence which limits good time to 15 percent of the term as opposed to one-third for non-rape offenses. RCW 9.94A150(1) After the appeal, however, the sentencing court imposed consecutive sentences (562 months total) that allow Burton the opportunity to earn good time credits as favorably as his original sentence. Burton will be able to reduce his sentences for robbery (105 months) and burglary (153 months) by up to one-third each and reduce his rape sentence (304 months) by 15 percent. RCW 9.94A.150(1) He is eligible to earn early release time in segments adding up to a total of 131.60 months as opposed to 130.74 months in the original sentence. *Burton,* 1997 WL 306429 at *14. His new sentence is slightly less severe than his original sentence. Accordingly, the *Pearce* presumption does not apply and the sentencing court did not exceed the scope of remand.

Burton further argues that the trial court exceeded the scope of remand in recalculating his offender scores. Generally, the law of the case doctrine would make the offender score binding in subsequent appeals. *State v. Worl,* 129 Wn.2d 426, 425, 918 P.2d 905 (1996). Except, the doctrine is

discretionary when controlling law changes between the appellate decision and proceedings on remand. *Coffel v. Clallam County,* 58 Wn.App. 517, 521, 794 P.2d 513 (1990). Before Burton's third sentencing hearing, the Washington Supreme Court held that under RCW 9.94A 360(6), a sentencing court may not count some concurrently-served prior convictions as one offense and count others separately. *State v. Bolan,* 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996). Rather, the sentencing court must count concurrently served prior convictions as one offense or each as separate offenses. *Bolar,* 129 Wn.2d at 366. Since the Washington Supreme Court made this ruling before the third sentencing hearing, the sentencing court was correct in recalculating Burton's offender score for rape as follows:

Offense	**Sentence Date**	**Cause No.**	**Score**
Forgery	5/31/1991	90-1-06110-4	1
Fraud (Indiana)	1/9/1992	10E01 9110 CF 636	1
Theft (Indiana)	1/9/1992	10E019110 CF 636	1
Sexual Exploitation of a Minor	11/20/1992	92-1-02798-1	3
Child Molestation 2	11/20/1992	92-1-02798-1	3
Rape of a Child 2	11/20/1992	92-1-02798-1	3
Robbery 1	(Count II)	93-1-06948-7	2
Burglary 1	(Count III)	93-1-06948-7	2
Offender Score for Rape			**16**

Following *Bolar*, the court properly added Burton's offender score for rape after counting his concurrently served prior convictions as separate offenses. Therefore, the court did not exceed the scope of remand.

(Dkt. 12, Exh. 2 at 6-8 (footnote omitted).)

Petitioner relies on the "law of the case doctrine" for the proposition that the sentencing judge was required to use the same method of computing his offender score because the Court of Appeals for the State of Washington had affirmed the calculation; thus, the judge should have merged his prior King County convictions as she had done with the prior Indiana convictions, instead of un-merging the Indiana convictions so that she could also count the King County convictions separately. (Dkt. 13 at 10-11.) Petitioner's reliance on the doctrine is misplaced.

In *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997), the Ninth Circuit Court of Appeals explained that the "law of the case is a discretionary doctrine," and that the doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Jeffries,* 114 F.3d at 1489 (quoting *Messenger v. Anderson,* 255 U.S. 436, 444 (1912)); *see also Merritt v. Mackey,* 932 F.2d 1317, 1320 (9th Cir. 1991) ("The doctrine is discretionary, not mandatory."). The Ninth Circuit noted, however, that this discretion is not unlimited. The Court stated that "the prior decision should be followed unless: '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, *(2) intervening controlling authority makes reconsideration appropriate,* or (3) substantially different evidence was adduced at a subsequent trial.'" *Jeffries*, 114 F.3d at 1489 (emphasis added) (footnote and citations omitted).

In the instant case, new controlling authority was created between the date of the appellate decision and the date of petitioner's third re-sentencing. (*See* Dkt. 13 at 9-10.) This created an exception to the "law of the case" doctrine, and provided a basis for the sentencing judge to reconsider the calculation of petitioner's offender score.

Therefore, the Court of Appeals' decision pertaining to the re-calculation of petitioner's offender score was not contrary to, or an unreasonable application of, established federal law.

Petitioner next claims that the trial court erred in considering additional aggravating factors on remand, specifically one that had been raised before and then rejected, and one that had never been offered on the evidence. (*Id.* at 13.) The state appeals court had rejected this claim on the basis that the sentencing judge's decision had also been based on aggravating factors that were presented at earlier sentencing hearings, and therefore, found no error in citing to the additional factors. (Dkt. 11 at 16.) Petitioner does not articulate a specific objection to that decision, other than that it gives rise to the conclusion that the sentencing judge was actually vindictive, as discussed below. (*See* Dkt. 13 at 14-16.)

Petitioner argues that the cumulation of the trial judge's decisions during petitioner's third re-sentencing proves her actual vindictiveness. (*Id.* at 13-16.) Petitioner cites to the fact that: (1) this was the third time she had been asked to re-sentence him; (2) she un-merged his prior convictions in order to preserve the exceptional sentence she had already imposed, (3) she cited to new aggravating factors in support of the new sentence, and (4) she imposed an "alternative" sentence in case her aggregate sentence was reversed on appeal.[4] (Dkt. 13 at 14-15.) Petitioner states that "[a]lthough the actual sentence [he] received at

[4] The Court of Appeals for the State of Washington subsequently vacated the "alternative" sentence imposed by the trial judge at the same time the Court affirmed petitioner's third sentence. (Dkt. 12, Exh. 2 at 11-12.)

the third sentencing was arguably 'not more severe' than the sentence he received at the previous sentencing, it was more severe than the sentence he should have received if the sentencing judge did not go out of her way to reverse her previous rulings and adopt new and previously-rejected aggravating factors." (Dkt. 13 at 14.)

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Supreme Court held that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. . . [D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Pearce*, 395 U.S. at 725. The Court further held that "[i]n order to assure the absence of such a motivation, . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear." *Id.* at 726. Here, petitioner did not receive a more severe sentence than was previously imposed, and, in fact, he is now eligible for slightly more "good time credit" (Dkt. 12, Exh. 2 at 7.) Therefore, the *Pearce* presumption of vindictiveness does not arise as a result of imposing the same aggregate sentence. Petitioner argues, however, that the presumption arises because the judge actually raised his offender score for the third sentence. (Dkt. 13 at 15.) The Court disagrees with this argument since it has already determined that the new calculation of petitioner's offender score did not violate his constitutional rights, as discussed above.

Petitioner further argues that "'where the prophylactic rule of *Pearce* does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon

resentencing.'" (Dkt. 13 at 14 (quoting *Texas v. McCullough,* 475 U.S. 134, 138 (1986) (citation omitted).) The Court does not believe petitioner has proven actual vindictiveness. First, petitioner received a "better" sentence than he had received earlier as he now has an opportunity to earn more early release credits. Second, as discussed above, the Court has found that there was no impropriety in recalculating his offender score. Third, although the sentencing judge cited additional aggravating factors in support of the imposed exceptional sentence, the "exceptionality" of the sentence did not rely on the additional factors, so there was no prejudice to the petitioner by citing them. (*See* Dkt. 12, Exh. 2 at 11.) Finally, the state court of appeals noted that the presumption of vindictiveness had arisen from petitioner's second re-sentencing "only because the sentencing judge ran Burton's sentences concurrently instead of consecutively. . . . The presumption of vindictiveness was a technical one. Nothing in the record indicates that the sentencing judge, (who was also the trial judge), possessed actual bias towards Burton." (Dkt. 12, Exh. 2 at 5.) Therefore, the fact that the *Pearce* presumption was applied to petitioner's re-sentencing previously does not convince the Court that the judge was actually vindictive at the third re-sentencing. Thus, petitioner's claims that his sentence violated his due process rights fails

Finally, petitioner argues that his sentence violates the recent decision by the Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,* ___ U.S. ___, 122 S. Ct. 2428 (2002), in that the sentenced imposed was above the statutory maximum and was based on factors determined by the judge, not the jury. (Dkt. 13 at 17-27.) Respondent answers that petitioner's sentence

does not exceed the statutory maximum for his crime, so *Apprendi* and *Ring* do not apply. (Dkt. 11 at 17.) The Court agrees with respondent. Petitioner attempts to assert that he is serving 562 months only for his first degree rape conviction, while ignoring the fact that he was also convicted of first degree robbery and first degree burglary, with a weapon enhancement on all three crimes. Petitioner actually received an aggregate 562-month sentence for all three counts – 304 months for the rape count, 153 months for the robbery count and 105 months for the burglary count, to run consecutively. (Dkt. 12, Exh. 2 at 4.) Petitioner concedes that the maximum penalty he could have received for the rape was 304 months. (Dkt. 13 at 25.) This is, in fact, what he received. Petitioner makes no mention of the other two parts of his aggregate sentence. Thus, petitioner's sentence was not outside the statutory maximum for his crime, and he fails to show any due process violation Accordingly, the Court should dismiss petitioner's habeas action with prejudice.

CONCLUSION

For the reasons set forth above, I recommend petitioner's claims for federal habeas relief be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation

DATED this 8 day of November, 2002.

/s/ John L. Weinberg
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L. BURTON, Petitioner, v. DOUG WADDINGTON, Respondent.	CASE NO. C02-140L ORDER DENYING HABEAS PETITION (Filed Dec. 17, 2002)

The Court, having reviewed the Petition for Writ of Habeas Corpus, Respondent's Answer, the Report and Recommendation by the Honorable John L. Weinberg, United States Magistrate Judge, and the remaining record, finds and Orders as follows:

(1) The Court adopts the Report and Recommendation.

(2) Petitioner's Petition for Writ of Habeas Corpus (Dkt. #3) is DENIED and dismissed with prejudice.

(4) The Clerk shall send copies of this order to counsel for each party and to the Honorable John L. Weinberg

DATED this 17th day of December, 2002.

/s/ Robert S. Lasnik
ROBERT S. LASNIK
United States District
Court Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE L. BURTON, Petitioner-Appellant, v. DOUG WADDINGTON, Respondent-Appellee.	No. 03-35095 D.C. No. CV-02-00140-RSL MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued May 3, 2004
Submission Vacated May 11, 2004
Submitted July 28, 2005
Seattle, Washington

(Filed Jul. 28, 2005)

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

Lonnie Lee Burton ("Burton") appeals the district court's denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1994, a jury convicted Burton of rape in the first degree, robbery in the first degree, and burglary in the first degree.[1] Burton challenges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] As the parties are familiar with the facts, we do not recite them here.

his consecutive sentence of 304 months for the rape, 153 months for the robbery, and 105 months for the burglary, for a total of 562 months on several constitutional grounds. We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm. We review *de novo* a district court's denial of a petition for writ of habeas corpus under 28 U.S.C. § 2254. *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir. 2001).

I.

The state argues that the district court lacked jurisdiction over Burton's 2002 habeas petition because this court had not granted leave to file a "second or successive" petition pursuant to 28 U.S.C. § 2244(b)(3)(A). We disagree. In 1998, Burton filed his first federal habeas petition challenging his conviction. At that time, the state court judgment as it related to Burton's sentence was not yet final because Burton's challenge to his sentence was still pending before the state court of appeal. Because Burton had not yet exhausted his federal constitutional claims in state court at the time he filed his first federal habeas petition, they were not ripe for federal habeas review. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring a state prisoner to exhaust his claims in state court before he is allowed to bring an action in federal court for habeas relief). Therefore, Burton was not required to challenge his sentence in his first federal petition because no meaningful relief would have been available at that time. *See LaGrand v. Stewart*, 170 F.3d 1158, 1159 (9th Cir. 1999) (order). We agree with the district court that Burton's petition is not "second or successive" because he had a "legitimate excuse for failing to raise a claim at the appropriate time." *See McClesky v. Zant*, 499 U.S. 467, 490 (1991).

II.

Burton claims that his due process rights were violated when the trial court increased his offender score at the sentencing hearing by separately counting his Indiana theft and fraud convictions, rather than aggregating them as it had done in the first and second sentencing hearings. Because Burton has not shown that the Washington Court of Appeals' application of the law of the case doctrine was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States" 28 U.S.C. § 2254(d)(1), we affirm the district court's denial of relief on this claim.

III.

Burton next argues that his due process rights were violated because the sentencing court was vindictive in imposing an exceptional sentence at his third sentencing hearing. As the Washington Court of Appeals noted, Burton's third sentence is lower than his original sentence, and is therefore not presumptively vindictive under *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794 (1989). Because Burton has not shown that the trial court was vindictive in violation of clearly established federal law, Burton's claim is not cognizable under 28 U.S.C. § 2254(d)(1).

IV.

Finally, Burton argues that his exceptional sentence was imposed in violation of his Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004). We expanded the Certificate of Appealability and requested

supplemental briefing on the impact of *Blakely* and *United States v. Booker,* 125 S. Ct. 738 (2005), on this case.

Although *Apprendi* was decided before Burton's conviction became final and may therefore be applied to this case, the state argues that *Blakely* – decided after Burton's conviction became final – established a new rule that does not apply retroactively on collateral review. *See Teague v. Lane,* 489 U.S. 288, 310 (1989). We agree. *See Schardt v. Payne,* ___ F.3d ___, 2005 WL 1593468 (9th Cir. July 8, 2005) (holding that *Blakely* does not apply retroactively to a 28 U.S.C. § 2254 habeas petition).

Apprendi held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490. The statutory maximum for each of the offenses to which Burton was found guilty was life imprisonment. *See* WASH. REV. CODE §§ 9A.44.040(2), 9A.52.020(2), 9A.56.200(2) (classifying rape in the first degree, burglary in the first degree, and robbery in the first degree as class A felonies); § 9A.20.021(1)(a) (setting statutory maximum for class A felonies as life imprisonment). At Burton's third sentencing hearing, the judge imposed consecutive sentences of 304 months for the rape conviction, 153 months for the robbery conviction, and 10.5 months for the burglary conviction, for a total of 562 months. Because the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate *Apprendi. See United States v. Shryock*, 342 F.3d 948, 989 (9th Cir. 2003) (holding that where statutory maximum for murder in either the first or second degree was life imprisonment, court did not err in sentencing under provision for

first degree murder on the basis of judge-found facts); *United States v. Sua*, 307 F.3d 1150, 1154 (9th Cir. 2002) (holding that *Apprendi* was not violated where sentence imposed did not exceed the statutory maximum); *see also United States v. Buckland*, 289 F.3d 558, 570 (9th Cir. 2002) (en banc) (finding no *Apprendi* violation where none of the individual sentences imposed consecutively exceeded the statutory maximum for that offense).

Accordingly, we **AFFIRM**.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LONNIE LEE BURTON, Petitioner-Appellant, v. DOUG WADDINGTON, Respondent-Appellee.	No. 03-35095 D.C. No. CV-02-00140-RSL Western District of Washington, Seattle ORDER (Filed Oct. 13, 2005)

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b).

Therefore, the petition for rehearing and the petition for rehearing en banc are DENIED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 5, 2006

Mr. Brian Tsuchida
Office of the Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle, WA 98101

Re: Lonnie Lee Burton
v. Douglas Waddington, Superintendent,
Stafford Creek
Corrections Center
No. 05-9222

Dear Mr. Tsuchida:

The Court today entered the following order in the above-entitled case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted."

Sincerely,

William K. Suter, Clerk

by /s/ DJ McNerney

Denise McNerney
Merits Case Clerk

(1)

No. 05-9222

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

CORRECTED COPY

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

BRIAN TSUCHIDA
LAURA E. MATE
Federal Public Defender
Western District
of Washington
1601 Fifth Avenue
Suite 700
Seattle, WA 98101

JEFFREY L. FISHER
Counsel of Record
PAMELA S. KARLAN
STANFORD LAW SCHOOL
Supreme Court
Litigation Clinic
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

THOMAS C. GOLDSTEIN
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

AMY HOWE
KEVIN K. RUSSELL
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petitioner was given an exceptional sentence of 258 months above the 304 month ceiling of the statutory sentencing range, and this Washington State sentence became final after *Apprendi v. New Jersey*, but before *Blakely v. Washington*:

1. Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?

2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Memorandum and Disposition of the United States Court of Appeals for the Ninth Circuit is unpublished but is reported at *Burton v. Waddington*, 142 Fed. Appx. 297 (CA9 2005), and reproduced at J.A. 78. The decision of the United States District Court for the Western District of Washington is unpublished and is reproduced at J.A. 77.

JURISDICTION

The Ninth Circuit issued its decision on July 28, 2005. The Ninth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on October 13, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Based on factual findings it made by a preponderance of the evidence, a trial court in Washington State gave Petitioner Lonnie Lee Burton an "exceptional sentence" – enhancing his sentence by over twenty-one years more than was allowed by his jury verdict alone. Before Petitioner's sentence became final, this Court made clear in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth and Fourteenth Amendments prohibit courts from making their own findings to impose sentences above the "statutory maximum" permitted by "the jury verdict alone." *Id.* at 483, 490. Such facts must be proven to a jury beyond a reasonable doubt. *Id.* at 390. Petitioner, however, was unable to convince the Washington courts that this holding rendered his sentence unconstitutional. Accordingly, he brought the instant federal habeas petition, renewing his claim that the imposition of his exceptional sentence violated the Sixth and Fourteenth Amendments. While that petition was pending, this Court confirmed in *Blakely v. Washington*, 542 U.S. 296 (2004), that *Apprendi* applied specifically to Washington's system for imposing exceptional sentences. The issue here is whether the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), forecloses a federal court from applying *Blakely* to Petitioner's claim.

1. Based on information from a jailhouse informant, it was alleged that in 1991 Petitioner followed a teenager home from school, forced his way into his home, had sex with him, and stole $160 from a dresser before he left. J.A. 44. The State of Washington charged, and in 1994, convicted Petitioner of rape in the first degree (count I), robbery in the first degree (count II) and burglary in the first degree (count III). The Washington courts upheld Petitioner's convictions, and federal courts rejected Petitioner's

attempt to challenge them through habeas corpus proceedings. *See Burton v. Walter*, No. 00-35579, 2001 WL 1243655 (CA9 May 30, 2001) (affirming district court judgment).

The imposition of Petitioner's sentence did not go as smoothly. Washington appellate courts vacated his first two sentences for reasons not relevant here. On March 13, 1998, the trial court proceeded to sentence Petitioner a third time. Under Washington law as it existed at the time of Petitioner's sentencing – the same law that would later be the subject of this Court's *Blakely* decision – statutes subjected offenders to "standard" or "presumptive" sentences based on the crime(s) of conviction. Courts, however, could depart above these standard ranges and impose so-called "exceptional sentences" – up to a second statutorily established limit – upon finding "aggravating facts" not encompassed in jury verdicts. Washington law empowered courts themselves to make such findings by a preponderance of the evidence, rather than submitting such allegations for juries to find beyond a reasonable doubt. *See* Wash. Rev. Code. §§ 9.94A.120, 9.94A.390 (1998)[1]; *Blakely*, 542 U.S. at 299-300.

The trial court calculated the following statutory standard ranges for each for Petitioner's counts of conviction: Count I: 234-304 months; Count II: 153-195 months;

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[1] These citations to Washington's sentencing code, and all others that follow, are to the law as it existed at the time of Petitioner's sentencing. The Washington Legislature recodified these sections in later years. Then, following the *Blakely* decision, the Legislature amended the State's sentencing laws to require that all aggravating facts supporting exceptional sentences (other than the fact of a prior conviction) be alleged in advance and, if disputed, proved to a jury beyond a reasonable doubt. *See* Wash. Rev. Code §§ 9.94A.535, 537 (2005).

Count III: 105-134 months. J.A. 6. Washington law required sentences for offenses such as these to run concurrently unless the trial court found aggravating facts were present "under the exceptional sentence provisions of [Wash. Rev. Code §] 9.94A.120 and 9.94A.390(2)(g) or any other provision of [Wash. Rev. Code §] 9.94A.390." Wash. Rev. Code § 9.94A.400 (1998). Accordingly, Petitioner's maximum sentence based on the jury verdict alone was 304 months – the top end of the highest of the three standard ranges. J.A. 6. His maximum possible exceptional sentence was life in prison. J.A. 6.

The trial court invoked the exceptional sentence provisions and imposed a total sentence of 562 months. J.A. 9. In support of this 258-month enhancement, the sentencing court found three aggravating facts to be present pursuant to Wash. Rev. Code § 9.94A.390: (a) Petitioner acted with "deliberate cruelty"[2]; (b) Petitioner's actions "demonstrate[d] sophistication and planning of [the] sort that makes the defendant a significantly different offender"; and (c) Petitioner's "long criminal history, combined with the 'multiple offense policy,' results in a sentence that is clearly too lenient in light of the purposes of the Sentencing Reform Act." J.A. 29-31.

2. The Washington Court of Appeals upheld Petitioner's sentence, and, on December 5, 2000, the Washington Supreme Court denied discretionary review. J.A. 55.

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[2] This, of course, is the same aggravating factor that was later at issue in *Blakely*. *See Blakely*, 542 U.S. at 300.

3. Meanwhile, before Petitioner's sentence had become final, this Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (June 26, 2000), that the Sixth and Fourteenth Amendments require any fact (other than the fact of a prior conviction) "that increases the penalty for a crime beyond the prescribed statutory maximum [to] be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. This Court also defined "statutory maximum" as the statute setting the maximum sentence a defendant could receive "if punished according to the facts reflected in the jury verdict alone." *Id.* at 483. Upon receiving the Washington Supreme Court's denial of review, Petitioner filed a state habeas petition – known in Washington as a "personal restraint petition" or "PRP" – in the Washington Court of Appeals. Petitioner argued that the imposition of his exceptional sentence violated *Apprendi* because it exceeded the maximum sentence to which the jury verdict had exposed him.

While Petitioner's PRP was pending, the Washington Supreme Court took up the issue of whether the State's system for finding aggravating facts necessary to impose exceptional sentences ran afoul of the newly announced *Apprendi* rule. The Court held that it did not, reasoning that the "statutory maximum" in Washington's system was the statute setting the maximum possible exceptional sentence, not the maximum possible standard sentence. *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (Wash. 2001). The Court never mentioned the definition that *Apprendi* had given for the term "statutory maximum": "the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 483. Nor did it attempt to apply that definition

to Washington's system for imposing exceptional sentences.

Shortly thereafter, the Washington Court of Appeals denied Petitioner's PRP, explaining that the issue he raised was "clearly controlled by the recent [Washington] Supreme Court decision in *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001) (exceptional sentence may be imposed 'without factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt')." App. 2a.[3]

4. The Washington Supreme Court, through a commissioner, upheld the Washington Court of Appeals' denial of relief. The commissioner likewise relied on *Gore* for the proposition that "*Apprendi* does not apply to exceptional sentences that are otherwise within the statutory maximum for the crime." App. 3a. Like the Washington Supreme Court itself, the commissioner never mentioned the definition that *Apprendi* had given for the term "statutory maximum." Nor did he attempt to apply that definition to Petitioner's claim.

5. In January 2002, Petitioner filed a federal habeas petition in the U.S. District Court for the Western District of Washington. Among other claims, Petitioner renewed his *Apprendi* claim, asserting that his sentence in excess of the top of the range set by statute was unconstitutional because the factual findings used to support it were not submitted to a jury or proven beyond a reasonable doubt.

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[3] The relevant state appellate decisions involving Petitioner's PRP are attached as an Appendix to this brief because neither party officially entered them into the record in the district court.

Petition for Writ of Habeas Corpus, No. C02-0140 (Dkt. No. 3) at 6. The district court denied the petition. J.A. 77.

6. Petitioner asked the Ninth Circuit for a certificate of appealability on his *Apprendi* claim. That court initially denied this request. But after this Court held in *Blakely* that the rule of *Apprendi* applied to Washington's system for imposing exceptional sentences, the Ninth Circuit reversed itself and granted a certificate of appealability on Petitioner's *Apprendi* claim.

On the merits, however, the Ninth Circuit affirmed the district court's denial of habeas relief. J.A. 78. As is pertinent here, the Ninth Circuit first agreed with the State that *Blakely* "established a new rule that does not apply retroactively on collateral review." *Id.* In this respect, the Ninth Circuit simply cited its decision in *Schardt v. Payne*, 414 F.3d 1025 (CA9 2005), which had addressed the identical issue a few weeks earlier and held that *Blakely* announced a new rule because all of the federal courts of appeals prior to *Blakely* had held that *Apprendi* did not apply to a different sentencing system: the non-statutory Federal Sentencing Guidelines. 414 F.3d at 1035. Then, the Ninth Circuit held that "because [Petitioner's] sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate *Apprendi*." J.A. 81. Like the Washington courts and the *Schardt* panel before it, the Ninth Circuit never referenced *Apprendi*'s explicit definition of the term "statutory maximum" or attempted to apply it to Petitioner's sentence.

7. The Ninth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. J.A. 83.

8. This Court granted certiorari. 126 S. Ct. 2352 (2006).

SUMMARY OF ARGUMENT

The retroactivity doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989), does not bar applying this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), to Petitioner's habeas corpus claim.

I. The *Teague* doctrine applies only to decisions that announce "new rules" of criminal procedure, not to those that are "merely an application of the principle that governed" a prior Supreme Court case. *Teague*, 489 U.S. at 307 (quotation and citation omitted). The *Blakely* decision falls into the latter category. Before Petitioner's sentence became final, this Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth and Fourteenth Amendments require any fact (other than the fact of a prior conviction) "that increases the penalty for a crime beyond the prescribed statutory maximum [to] be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. This Court also emphasized that this inquiry was "one not of form, but of effect," explaining that the "statutory maximum" in any given sentencing regime is the statute setting the maximum sentence a defendant could receive "if punished according to the facts reflected in the jury verdict alone." *Id.* at 483, 494. The *Blakely* decision – as both the majority and dissents expressly recognized – simply applied this rule to Washington's system for finding aggravating facts necessary to impose exceptional sentences. Because the presence of such facts exposed defendants to greater punishment than authorized by jury

verdicts alone, judges' finding them by a preponderance of the evidence violated the Constitution.

The Ninth Circuit nevertheless reasoned that *Blakely* established a new rule because, prior to that decision, the federal courts of appeals unanimously agreed that *Apprendi* did not apply to a different sentencing system: the federal sentencing system. But that assertion fails to appreciate the difference between the Federal Sentencing Guidelines and the Washington exceptional sentence system at issue in *Blakely*. The Federal Sentencing Guidelines are not statutory in nature, so the announcement of *Apprendi*'s "statutory maximum" rule did not squarely implicate imposing sentences above the thresholds they established. The Washington exceptional sentence system in *Blakely*, however, set dual *statutory* limits – one for committing crimes without any aggravating factors, and one for committing crimes with aggravating factors. Accordingly, all this Court had to do to decide *Blakely* was to reiterate *Apprendi*'s holding that the relevant statutory maximum, for constitutional purposes, is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303 (citing *Apprendi*, 530 U.S. at 483). Because aggravating facts exposed Washington defendants to greater punishment than the State's statutory code otherwise authorized based on jury verdicts alone, courts' finding those facts by a preponderance of the evidence violated the Sixth and Fourteenth Amendments as surely as the same practice in *Apprendi* did.

II. Even if this Court were to hold that *Blakely* did somehow announce a "new rule," its rule would apply retroactively under *Teague*'s exception for "watershed rules of criminal procedure." To fall within this exception,

a new rule must meet two requirements: "[1] Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and [2] the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (quotations and citations omitted). The *Blakely* rule that facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits must be proven to juries beyond a reasonable doubt satisfies each of these tests.

First, infringing the reasonable doubt component of the *Blakely* rule seriously diminishes the likelihood of obtaining an accurate conviction. Applying this same test in two pre-*Teague* cases, this Court has held that applying the preponderance-of-the-evidence standard instead of the reasonable doubt standard – even, as functionally is at issue here, with respect to a single element of a crime – "substantially impairs [a criminal trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972); *see also Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977). These holdings make eminent sense and control here. Whereas the reasonable doubt standard requires a fact-finder to "reach[] a subjective state of certitude of the facts in issue," the preponderance standard "calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *In re Winship*, 397 U.S. 358, 364, 368 (1970) (quotations and citations omitted). It is obvious that using the latter inquiry to punish someone for something that the jury verdict itself does not otherwise allow

creates an impermissibly large risk of punishing someone for something they did not really do.

Second, both the reasonable doubt and jury trial components of the *Blakely* rule implicate our understanding of the bedrock procedural elements essential to the fairness of a proceeding. This Court has described both the reasonable doubt standard and the jury trial right as ancient guarantees "of surpassing importance." *Apprendi*, 530 U.S. at 476. And this Court's decision in *Blakely* makes clear that these protections are just as essential to fundamental fairness in the context of finding facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits as they are in the rest of trials. Without these protections, legislatures could relegate juries simply to determining "that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-07. Such a regime would flout our most basic conceptions of liberty.

ARGUMENT

This case comes to this Court on the threshold and limited question whether the Ninth Circuit correctly held that *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny preclude Petitioner from obtaining habeas relief on the basis of this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). They do not. The *Teague* doctrine provides that state prisoners may not obtain federal habeas relief based on "new" constitutional rules announced after their convictions became final, unless the rule at issue (1)

"forbid[s] criminal punishment of certain primary conduct [or] prohibit[s] a certain category of punishment for a class of defendants because of the status of their offense," or (2) is a "watershed" rule. *Teague*, 489 U.S. at 311; *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). But Petitioner does not seek the benefit of a new rule; he seeks only the benefit of the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as it was straightforwardly applied in *Blakely*. And even if *Blakely* itself had announced a new rule, it would constitute a watershed rule to which Petitioner would still be entitled to retroactive benefit. Consequently, this Court should reverse the Ninth Circuit's decision and remand for further proceedings.

I. THIS COURT'S DECISION IN *BLAKELY V. WASHINGTON* DID NOT ANNOUNCE A "NEW RULE."

A. A Decision That Merely Applies A Rule Enunciated In A Prior Supreme Court Case Does Not Announce A New Rule.

1. In *Teague v. Lane*, 489 U.S. 288 (1989), the plurality opinion explained when a case announces a "new" rule:

> In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (citations omitted).[4] This Court ratified this general test later that same Term, *see Penry*, 492 U.S. at 314, and has reaffirmed its formulations many times since. *See, e.g., Beard v. Banks*, 542 U.S. 406, 413 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997).

By contrast, a decision does not announce a new rule when it is "merely an application of the principle that governed" a prior Supreme Court case. *Teague*, 489 U.S. at 307. As Justice Kennedy has explained, "we ask whether the decision in question was dictated by precedent" in recognition of "[t]he comity interest served by *Teague*." *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment). If a decision of this Court was *not* dictated by precedent existing at the time the state prisoner's conviction became final, a federal court should not upset the finality of the conviction because the state court did not have fair notice that it was acting unconstitutionally. But if "all reasonable jurists" would have realized such precedent compelled the holding in the later decision, there is nothing unfair or subversive of federalism in applying the later decision to the prisoner's federal habeas claim. *Beard*, 542 U.S. at 413 (quoting *Lambrix*, 520 U.S. at 528).

Teague itself provided an example of a decision that simply applied the rule that governed a prior case and, therefore, did not announce a new rule: *Francis v. Franklin*, 471 U.S. 307 (1985), *cited in Teague*, 489 U.S. at 307. In *Francis*, this Court held that a jury instruction that allowed the jury to presume malice unconstitutionally

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[4] All citations to *Teague* from this point forward are to the plurality opinion.

relieved the state of its burden of proof beyond a reasonable doubt. It explained its decision this way:

> *Sandstrom v. Montana* [442 U.S. 510 (1979)] made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in [*In re Winship*, 397 U.S. 358 (1970)] on the critical question of intent in a criminal prosecution. 442 U.S. at 521. Today we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed.

Francis, 471 U.S. at 326-27. Notwithstanding the dissent's complaint that *Francis* "needlessly extend[ed] our holding in [*Sandstrom*] to cases where the jury was not required to presume *conclusively* an element of a crime under state law," *id.* at 332 (emphasis added) (Rehnquist, J., dissenting), this Court held unanimously three years later that *Francis* did not announce a new rule because it "was merely an application of the principle that governed our decision in *Sandstrom v. Montana*." *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988), *quoted in Teague*, 489 U.S. at 307.

2. Post-*Teague* decisions from this Court reinforce that merely applying a rule announced in a prior Supreme Court case does not announce a new rule. In *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that its decision in *Maynard v. Cartright*, 486 U.S. 356 (1988), did not announce a new rule because it "applied the same analysis and reasoning" found in a prior case. *Stringer*, 503 U.S. at 228. That prior case, *Godfrey v. Georgia*, 446 U.S. 420 (1980), had held that the aggravating factor of an "outrageously or

wantonly vile, horrible or inhuman" offense was unconstitutionally vague for purposes of determining eligibility for the death penalty. Although *Maynard* involved an aggravator with slightly different language – whether the offense was "especially heinous, atrocious, or cruel" – this Court explained in *Stringer* that "it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case." 503 U.S. at 228-29. The key, this Court explained, was that "[i]n applying *Godfrey* to the language before us in *Maynard*, we did not 'brea[k] new ground.'" *Stringer*, 503 U.S. at 229 (quoting *Butler v. McKellar*, 494 U.S. 407, 412 (1990)).

Stringer also concluded that this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), did not announce a new rule. Although this Court acknowledged that "there are differences in the use of aggravating factors under the Mississippi capital sentencing system [at issue in *Clemons*] and their use in the Georgia system in *Godfrey*," the Court explained that "those differences could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final." *Stringer*, 503 U.S. at 229. Because the rule adopted in *Godfrey* compelled the outcome in *Clemons*, *Clemons* did not announce a new rule.

Finally, this Court held in *Penry v. Lynaugh*, 492 U.S. 302 (1989), that the relief a state prisoner sought would not create a new rule because it was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), both of which were decided before the prisoner's conviction became final. Penry sought relief based on the proposition that when a capital defendant presents mitigating evidence of mental retardation and an abused background, courts must "give[] jury instructions

that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death." *Penry*, 491 U.S. at 315. Both *Lockett* and *Eddings* had held that sentencers in capital cases could not be precluded from considering certain potentially mitigating evidence. Even though those cases dealt with different kinds of mitigating evidence, this Court concluded that the rule Penry sought was "dictated by *Eddings* and *Lockett*." *Penry*, 492 U.S. at 319.

3. This Court's recent applications of past decisions to new sets of facts confirm that when an established rule governs a certain dispute, that rule does not implicate *Teague*. In *Williams v. Taylor*, 529 U.S. 362 (2000), for example, this Court applied its decision in *Strickland v. Washington*, 466 U.S. 668 (1984), to a petitioner's federal habeas claim. This Court explained:

> That the *Strickland* test "of necessity requires a case-by-case examination of the evidence," *Wright*, 505 U.S. at 308 (Kennedy, J., concurring in judgment), obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent "dictated" that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim. *Teague*, 489 U.S. at 301. And it can hardly be said that recognizing the right to effective counsel "breaks new ground or imposes a new obligation on the States."

Williams, 529 U.S. at 391 (quoting *Teague*, 489 U.S. at 301). Even though the precise basis for Williams' contention that he received ineffective assistance was different than the petitioner's in *Strickland*, Williams was nonetheless entitled to a full application of *Strickland*'s general

rule. *Id.* This Court recently reached a similar result in *Miller-El v. Dretke*, 545 U.S. 231 (2005), applying the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), to a new set of facts.

There can be no doubt, therefore, that Petitioner is entitled to apply the rule of *Apprendi* in his habeas petition. And to the extent the holding of *Blakely* flowed from simply applying *Apprendi* to a sentencing system that was different in form but not in kind from the one in *Apprendi*, Petitioner is entitled to the benefit of *Blakely* as well.

B. This Court's Decision In *Blakely* Simply Applied The Rule Already Announced In *Apprendi*.

This Court's opinions in *Apprendi* and *Blakely*, as well as a comparison between the underlying sentencing laws at issue in those cases, demonstrate that *Blakely* simply applied the rule already announced in *Apprendi*. It did not break new ground in holding that Washington's procedures for finding the aggravating facts supporting exceptional sentences were unconstitutional.

1. In *Apprendi*, this Court considered the legality of New Jersey's system for imposing a certain "sentence enhancement." Under that system, a defendant convicted of a given crime was subject to a statutorily established maximum sentence (in Apprendi's case, 10 years). A second statute, however, provided that a sentencing court could impose "an extended term" of imprisonment – up to 20 years – if it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or group on the basis of race or a similar characteristic. 530 U.S. at 468-69.

This Court in *Apprendi* ruled that New Jersey's sentence-enhancement system ran afoul of the Sixth and Fourteenth Amendments, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. But this Court did not stop there. This Court explained that the "statutory maximum" in a given sentencing scheme is the statute setting "the maximum [a defendant] would receive *if punished according to the facts reflected in the jury verdict alone.*" *Id.* at 483 (emphasis added); *see also id.* at 483 n.10 (the statutory maximum is the statutory "outer limit[]" based on "the facts alleged in the indictment and found by the jury"). *Apprendi* explained, in other words, that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment *than that authorized by the jury's guilty verdict?*" *Id.* at 494 (emphasis added). Because the hate-crime enhancement at issue there "increased . . . the maximum range within which the judge could exercise his discretion," this Court held that the trial court erred in imposing the enhancement based on a fact that it found by a mere preponderance of the evidence. *Id.* at 474; *see also id.* at 491-92.

Four years later, in *Blakely*, this Court confronted Washington's system for imposing exceptional sentences. Under that system, a defendant convicted of a given crime or crimes was subject to a statutorily established "standard," or "presumptive," statutory range. A second statute, however, empowered sentencing courts to impose a longer – so-called "exceptional" – sentence if they found one or more "aggravating facts" beyond those encompassed in the

guilty verdict. *See Blakely*, 542 U.S. at 299-300. This Court held that the Washington system was unconstitutional in the same way as the New Jersey system in *Apprendi* had been.

One need look no farther than the language in *Blakely* itself to understand that *Blakely* did nothing more than apply the rule of *Apprendi*. At the outset of its analysis, this Court explained that:

> This case requires us to *apply the rule we expressed in Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

542 U.S. at 301 (emphasis added). The State argued that the "statutory maximum" in Washington's system was not the statute setting the maximum sentence based solely on the guilty verdict (in Blakely's case, 53 months), but instead was the statute establishing the maximum possible exceptional sentence (10 years). *Id.* at 303.

This Court, however, rejected the State's argument, holding in no uncertain terms:

> Our precedents *make clear* . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*

542 U.S. at 303 (first emphasis added); *compare Yates*, 484 U.S. at 216-17 (*Francis* did not announce new rule in part because it explained that prior precedent "made clear" that state's argument lacked merit). For this proposition,

this Court cited and quoted *Apprendi*'s statement that the statutory maximum is the statute setting "the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Blakely*, 542 U.S. at 303 (quoting and citing *Apprendi*, 530 U.S. at 483).

Lest there be any doubt that *Blakely* broke no new legal ground, this Court further explained that "[t]he 'maximum sentence' is *no more* 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime)." *Blakely*, 542 U.S. at 304 (emphasis added). This Court's "commitment to *Apprendi* in this context" reflected nothing more than "respect for longstanding precedent" and a continuing need to give "intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305; *compare Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (*Apprendi* rule is necessary to give "intelligible content" to jury trial right).

This Court has noted that dissents from decisions also can illuminate whether those decisions announced new rules. *See Beard*, 542 U.S. at 415; *O'Dell v. Netherland*, 521 U.S. 151, 158-59 (1997). No dissent in *Blakely* disputed that *Apprendi* compelled the result the Court reached. The most any dissenter claimed was simply that this Court in *Blakely* made clear "it mean[t] what it said in *Apprendi*." *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting). Making clear that a prior opinion meant what it said, however, does not announce a new rule. The opinion must "break[] new ground" in some way necessary to its holding. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Nothing in *Blakely* did so.

Instead of basing their disagreement on the holding in *Blakely*, therefore, the *Blakely* dissenters directed their ire

at the rule of *Apprendi* itself. *See, e.g.*, 542 U.S. at 321 (O'Connor, J., dissenting) (explaining that the "*Apprendi* dissenters" were unwilling to follow its rule here); *id.* at 333 (Breyer, J., dissenting) (criticizing what sentencing systems have to do to conform "to *Apprendi*'s dictates"); *compare* majority opinion at 306 (referring to dissenters as "[t]hose who would reject *Apprendi*"). That presumably is why Justice O'Connor went so far as to concede that, on the basis of *Teague*'s "dictated by precedent" principle, "all criminal sentences imposed under [systems similar to Washington's] since *Apprendi* was decided in 2000 arguably remain open to collateral attack." 542 U.S. at 323-24 (O'Connor, J., dissenting) (citing *Teague*, 489 U.S. at 301, for the proposition that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").

All that was necessary to reach the result in *Blakely*, in short, was to recognize *Apprendi*'s definition of "statutory maximum" and to apply it with equal force to a sentencing system that was colloquially known as a "sentencing guidelines" system. *See* Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221, 252-55 (2005) (*Apprendi* "foreordained" the result in *Blakely*; "[a]ll the Court had to do to decide *Blakely* was to apply the rule exactly as *Apprendi* had stated it."); R. Craig Green, Apprendi's *Limits*, 39 U. Rich. L. Rev. 1155, 1169-82 (2005) ("the Court simply restated and applied *Apprendi*'s rule" in an "identical" manner). Indeed, in 2001, the Kansas Supreme Court unanimously invalidated the procedures in the Kansas Sentencing Guidelines for imposing enhanced sentences, accepting that "[u]nder *Apprendi*" the statutory maximum is the maximum punishment "authorized by the jury's verdict." *State v.*

Gould, 271 Kan. 394, 410, 23 P.3d 801 (Kan. 2001). The Washington Supreme Court, however, had upheld its exceptional sentence system by doing something no "reasonable jurists," *Beard*, 542 U.S. at 413 (quoting *Lambrix*, 520 U.S. at 528), would have done: failing to heed *Apprendi*'s definition of "statutory maximum" and its express admonition that applying this definition is a question "not of form, but of effect," 530 U.S. at 494. *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (Wash. 2001); *see also* App. 2a, 3a (rejecting Petitioner's claims on basis of *Gore*). The holding in *Blakely* simply forced Washington, as Kansas was already doing, to abide by clearly established law.

In holding that *Blakely* established a new rule, the Ninth Circuit simply duplicated the Washington courts' mistake: it ignored the definition of "statutory maximum" that *Apprendi* already had announced and this Court's admonition to focus not on form, but on effect of sentencing laws. *See* J.A. 81-82; *Schardt v. Payne*, 414 F.3d 1025, 1035 (CA9 2005). Once those directions are taken into account, it is clear that *Apprendi* foreordained the result in *Blakely*.

2. The Ninth Circuit reasoned that *Blakely* announced a new rule because "[e]very [federal] circuit court of appeals that addressed the question presented in *Blakely* reached the opposite conclusion from the rule subsequently announced by the Supreme Court." *Schardt*, 414 F.3d at 1035. In other words, the Ninth Circuit believed that *Blakely* announced a new rule because the holding in *Apprendi* did not dictate this Court's eventual holding in *United States v. Booker*, 543 U.S. 220 (2005), that the system in the Federal Sentencing Guidelines for enhancing sentences was unconstitutional.

This analysis, however, fails to appreciate the difference between the Washington sentencing system at issue in *Blakely* and the Federal Sentencing Guidelines. The holding in *Blakely* was not the same as the holding in *Booker*. Indeed, to the extent *Booker* is relevant here, this Court's analysis there confirms that the holding in *Blakely* was dictated by *Apprendi*, regardless of whether the holding in *Booker* was so dictated.

The Washington sentencing system at issue in *Blakely*, just like *Apprendi*, involved two *statutorily established* sentencing maximums: one for committing the crime without any aggravating circumstances, and one for committing the crime with at least one aggravating circumstance. And just like *Apprendi*, judges were empowered to find facts necessary to expose defendants to the higher maximum sentence. Accordingly, all this Court had to do to decide *Blakely* was to reiterate that the relevant statutory maximum, for purposes of the Sixth and Fourteenth Amendments, is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. at 303 (citing *Apprendi*, 530 U.S. at 483). Because Washington courts imposed exceptional sentences based on findings they made and that necessarily extended beyond the facts reflected in guilty verdicts, the system violated the Sixth and Fourteenth Amendments as surely as the one in *Apprendi* did.

The Federal Sentencing Guidelines, on the other hand, do not present a situation of dueling statutory maximums. For any given federal crime, the United States Code establishes a single maximum permissible sentence. The Guidelines (in their binding form prior to *Booker*) limited judicial discretion to impose sentences up to such

maximums not by statute, but by "quasi-legislative" rules enacted by an independent commission in the judicial branch. *See Mistretta v. United States*, 488 U.S. 361, 393 (1989). As Justice Thomas' concurrence in *Apprendi* indicated, therefore, the "unique status" of the Guidelines kept them from squarely implicating *Apprendi*'s "*statutory* maximum" rule and – for a time, at least – raised the possibility that they might be exempt from the *Apprendi* doctrine. 530 U.S. at 523 n.11 (Thomas, J., concurring).

The division of authority that *Blakely* triggered in the federal circuits concerning the constitutionality of the federal Guidelines underscores that even though the *Apprendi* rule did not neatly apply to the Guidelines, it did map directly onto Washington's "exceptional sentence" system. Some circuits, including the Ninth Circuit, concluded that because Washington's system took the form of a guidelines system, the Federal Sentencing Guidelines must be unconstitutional as well. *See United States v. Ameline*, 376 F.3d 967, 975-78 (CA9 2004); *United States v. Booker*, 375 F.3d 508 (CA7 2004). But other circuits and judges reasoned that because *Blakely*, like *Apprendi*, actually involved only "statutory sentencing thresholds," the decision could not be read as dictating that the Guidelines were invalid. *Booker*, 375 F.3d at 520 (Easterbrook, J., dissenting); *see also id.* ("*Apprendi* and *Blakely* hold that the Sixth Amendment commits to juries all statutory sentencing thresholds."). The Fourth Circuit, in fact, emphasized that considering "the factual and legal context in which *Blakely* was decided," *Blakely* "not only did not change the inquiry we must make, it also adhered to the rule the Court had announced in *Apprendi*." *United States v. Hammoud*, 381 F.3d 316, 348-50 (CA4 2004) (en banc).

Booker, to be sure, resolved this conflict in favor of robustly construing the *Apprendi* doctrine to cover binding thresholds in both statutory and non-statutory sentencing systems. But this Court never disagreed with the analysis of *Blakely* in opinions like the Fourth Circuit's. Indeed, this Court's reasoning in *Booker* further confirmed that *Blakely* – if not necessarily *Booker* – was dictated by *Apprendi*. The *Booker* Court first reiterated that "the requirements of the Sixth Amendment were *clear*" in *Blakely*. 543 U.S. at 232 (emphasis added). It then acknowledged that, in contrast to *Blakely*, "the language used in our holding in *Apprendi*" did not squarely cover the Federal Sentencing Guidelines because the Guidelines' sentencing thresholds are not statutory. *Booker*, 543 U.S. at 238. This difference required this Court to assess the general "principles [*Apprendi*] sought to vindicate." *Id.* After doing so, this Court held that the Sixth Amendment fact-finding requirements in *Apprendi* should apply "[r]egardless of whether the legal basis for the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239.

Justice Breyer's opinion dissenting in part (for the same four Justices who dissented in *Blakely*) echoed this analysis. Unlike the dissenting opinions in *Blakely*, which had accepted that the result there was compelled by *Apprendi*, Justice Breyer's dissent in *Booker* argued that there was actually a "principled basis for refusing to extend *Apprendi*'s rule" to the Guidelines. *Booker*, 543 U.S. at 334 (Breyer, J., dissenting in part). That basis, the dissent explained, was that the Guidelines involve mere "administrative rules," so they do not allow Congress to label factual inquiries that should be elements as sentencing factors and thereby evade the beyond-a-reasonable-doubt

and jury-trial guarantees. *Id.* at 330-32. Furthermore, administrative rules created by a commission in the Judicial Branch resemble appellate decisionmaking concerning the reasonableness of sentences, which falls outside of *Apprendi*'s rule. To the extent *Blakely* could be read as implying that the *Apprendi* doctrine should apply with equal force to such rules, *Blakely* did not have to extend *Apprendi* in that manner because "*Blakely*, like *Apprendi*, involved sentences embodied in a statute." *Booker*, 543 U.S. at 332 (Breyer, J., dissenting in part).

In sum, the inquiry whether *Apprendi* dictated *Blakely* is not the same as whether *Apprendi* dictated *Booker*. This Court need not address here whether *Apprendi* dictated *Booker*. The only question here is whether the *holding* of *Blakely* – *i.e.*, that when there are two statutory sentencing thresholds, the statutory maximum for Sixth and Fourteenth Amendment purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," 542 U.S. at 303 – was dictated by *Apprendi*. There can be no doubt that the answer is yes.

II. IF *BLAKELY* DID ANNOUNCE A NEW RULE, IT ANNOUNCED A WATERSHED RULE OF CRIMINAL PROCEDURE.

If this Court were to determine that the holding in *Blakely* somehow established a new rule, then *Teague* still would not bar applying it to Petitioner's claim because the *Blakely* rule qualifies as a "watershed rule[] of criminal procedure." *Teague*, 489 U.S. at 311. This exception to the general bar on retroactively applying new rules of criminal procedure to state prisoners gives life to Justice Harlan's observation – echoed contemporaneously by Justice Powell

and Judge Friendly and in later years repeatedly by this Court – that a central purpose of federal habeas review is to ensure that "no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting), *quoted in Teague*, 489 U.S. at 312; *see also Stone v. Powell*, 428 U.S. 465, 491-92 n.31 (1976) (habeas rules should "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"); Henry Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151-52 (1970) (same); *O'Neal v. McAninch*, 513 U.S. 432, 442 (1995) (the "basic purposes underlying the writ" include addressing "the *sort* [of constitutional error] that risks an unreliable trial outcome and the consequent conviction of an innocent person"); *Bousley v. United States*, 523 U.S. 614, 620 (1998) (same). This concern, of course, encompasses not only imprisoning individuals who are innocent of committing any crime but also those who committed some transgression but are innocent of a more serious offense for which a state is punishing them. Even when a state court's infringement of a constitutional rule was not apparent while a case was on direct review, federal courts must apply a "watershed" rule retroactively, in short, to address the "impermissibly large risk," *id.*, that a person may be serving prison time for something he did not do.

"To fall within this exception, a new rule must meet two requirements: [1] Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and [2] the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665

(2001) (internal quotations and citations omitted). The *Blakely* rule that facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits must be proven to juries beyond a reasonable doubt satisfies each of these tests.

A. Infringing the *Blakely* Rule Seriously Diminishes the Likelihood of Obtaining An Accurate Conviction.

The *Apprendi/Blakely* rule has two distinct components: the requirement that facts authorizing a sentence above an otherwise binding statutory threshold be found beyond a reasonable doubt, and the requirement that those facts be found by a jury. *See Apprendi*, 530 U.S. at 476-78; *Blakely*, 542 U.S. at 301. Although this Court held in *Schriro v. Summerlin*, 542 U.S. 348 (2004), that infringing the jury-trial component of *Apprendi*'s rule (and by implication, *Blakely*'s rule) does not seriously diminish the likelihood of obtaining an accurate conviction, there is no question that infringing the reasonable doubt component of the *Apprendi/Blakely* rule – as the Washington courts did here – does so.

In a pair of pre-*Teague* cases, in fact, this Court already reached this conclusion while conducting the very same accuracy-diminishing inquiry that *Teague* later adopted. Initially, this Court addressed in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), the question whether, under its old retroactivity jurisprudence, failing to apply the beyond-a-reasonable-doubt rule of *In re Winship*, 397 U.S. 358 (1970), "substantially impairs [a criminal trial's] truth-seeking function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Ivan V.*, 407 U.S. at 204. This Court held that it did, because

"the major purpose" of using the constitutional standard of proof beyond a reasonable doubt instead of a preponderance standard is "to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." *Id.* at 205; *see also Brinegar v. United States*, 338 U.S. 160, 174 (1949) (reasonable doubt standard "developed to safeguard men from dubious and unjust convictions"). Several years later, again applying the same test, this Court made clear that failing to use the reasonable doubt standard *even with respect to only one element of a crime* "substantially impairs the truth-finding function" of trial just as impermissibly as failing to use that standard across the board. *Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977). "The reasonable-doubt standard of proof is as 'substantial' a requirement under [*Mullaney v. Wilbur*, 421 U.S. 684 (1975)] as it was in *Winship*" because failing to use that standard with respect to a single element raises equally "serious questions about the accuracy of guilty verdicts in past trials." *Id.* at 243-44.

These holdings make eminent sense and control here. Whereas the reasonable doubt standard requires a fact-finder to "reach[] a subjective state of certitude of the facts in issue," the preponderance standard "calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *Winship*, 397 U.S. at 364, 368 (quotation and citation omitted). It follows ineluctably that using a preponderance standard instead of the reasonable doubt standard presents "a *far greater* risk of factual errors that result in convicting the innocent." *Id.* at 371 (Harlan, J., concurring) (emphasis added); *see also Lego v. Twomey*, 404 U.S. 477, 493 (1972)

(Brennan, J., dissenting) ("Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent."). And this Court made clear in *Apprendi* and *Blakely* that even when a jury has found a defendant guilty beyond a reasonable doubt of a certain crime, the same inordinate level of risk is present when courts use a preponderance standard to assess whether the defendant should be punished more severely than a jury verdict alone allows. *See Apprendi*, 530 U.S. at 484-85; *Blakely*, 542 U.S. at 306, 311-12.

The Ninth Circuit nevertheless opined in the case that controlled its decision here that infringing on the *Blakely* rule does not seriously undermine the likelihood of obtaining an accurate conviction because the rule "does not affect the determination of a defendant's guilt or innocence" but rather "addresses only how a court imposes a sentence, once a defendant has been convicted." *Schardt*, 414 F.3d at 1036 (quoting *United States v. Price*, 400 F.3d 844, 848 (CA10 2005)). But this statement ignores the very holdings of *Blakely* and *Apprendi*. Those decisions hold that a "sentence enhancement" or "aggravating factor" that exposes a defendant to a longer sentence is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494 n.19; *see also Blakely*, 542 U.S. at 310-11 (repeatedly referring to sentence enhancements covered by *Blakely* as "elements"); *Washington v. Recuenco*, 126 S. Ct. 2546, 2552 (2006) (holding of *Apprendi* is that "elements and sentencing factors must be treated the same for Sixth Amendment purposes"). In other words, a State may not "circumvent the protections of *Winship* merely by 'redefin[ing] the elements that constitute different crimes, characterizing

them as factors that bear solely on the extent of punishment.'" *Apprendi*, 530 U.S. at 485 (*quoting Mullaney*, 421 U.S. at 698). Accordingly, the constitutional violation that *Blakely* addresses is failing to use the proper procedural protections (specifically, a jury and the beyond a reasonable doubt standard) for determining whether a defendant is guilty of an aggravated crime. That is exactly the sort of error that this Court has made abundantly clear seriously diminishes the likelihood of obtaining an accurate conviction.

B. The *Blakely* Rule Implicates Our Understanding Of The Bedrock Procedural Elements Essential To The Fairness Of A Proceeding.

The Ninth Circuit also erred in holding that the *Blakely* rule does not satisfy the "bedrock" prong of *Teague*'s watershed exception. The court concluded that neither the beyond-a-reasonable-doubt component nor the jury-trial component of the rule involves "the sort of error that necessarily undermines the fairness . . . of judicial proceedings." *Schardt*, 414 F.3d at 1036 (quotations and citations omitted). Both of these conclusions are mistaken. Each of the components of the *Blakely* rule independently satisfies this prong of *Teague*'s watershed exception.

1. The due process requirement that facts exposing defendants to punishment beyond otherwise applicable statutory maximums must be found beyond a reasonable doubt is a "bedrock procedural element essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (quotation and citation omitted). This Court's opinion in *Winship* leaves little doubt that the reasonable doubt standard is indispensable to any criminal adjudication:

> The reasonable-doubt standard plays a *vital role* in the American scheme of criminal procedure. It is a *prime instrument* for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – *that bedrock axiomatic and elementary principle* whose enforcement *lies at the foundation of the administration of our criminal law*. . . . [A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage *amounting to a lack of fundamental fairness*, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

397 U.S. at 363 (emphasis added) (quotation and citation omitted); *see also id.* at 372 (Harlan, J., concurring) (using reasonable doubt standard instead of a preponderance of the evidence standard is "an expression of fundamental procedural fairness . . . for criminal trials"); *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (The reasonable doubt standard "is an ancient and honored aspect of our criminal justice system."); *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979) (a conviction that does not satisfy so "fundamental a substantive constitutional standard" cannot stand).

Applying the reasonable doubt standard is just as important in the context of factual findings, as in *Blakely*, that expose defendants to punishment beyond otherwise applicable statutory maximums as it is with respect to other elements of crimes. This Court reiterated in *Apprendi*, in just this context, that the reasonable doubt standard is a "constitutional protection[] of surpassing importance." 530 U.S. at 476. Without this rule, a defendant guilty of doing something wrong – but not something as serious as the government alleged – could see his

sentence "balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report complied by a probation officer who the judge thinks more likely got it right than wrong." *Blakely*, 542 U.S. at 311-12; *see also id.* at 306 (dispensing with the *Blakely* rule "would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of possessing the firearm used to commit it – or of making an illegal lane change while fleeing the crime scene."). Such a regime would controvert our most fundamental conceptions of liberty.

2. Even if the beyond-a-reasonable-doubt component of *Blakely*'s rule did not implicate the bedrock procedural elements essential to the fairness of a proceeding, the jury-trial component of the rule would. While the Ninth Circuit suggested that this Court's decision in *Schriro* foreclosed such a conclusion, *see Schardt*, 414 F.3d at 1036, this is incorrect. *Schriro* held only that requiring a jury to find a fact exposing a defendant to heightened punishment did not satisfy the accuracy prong of *Teague*'s watershed exception, *see Schriro*, 542 U.S. at 355-58; this Court did not address the "bedrock" prong. A straightforward application of that prong dictates that the jury-trial component of *Blakely*'s rule satisfies it.

This Court has never wavered from the proposition that the right to trial by jury – a right that is "several centuries" old – is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149-51; *see also Schriro*, 542 U.S. at 358 ("The right to jury trial is fundamental to our system of criminal justice."). It "reflect[s] a fundamental decision about the exercise of official power," as well as "a profound judgment about the way in which law should be enforced and justice

administered." *Duncan*, 391 U.S. at 155-56. The jury is indispensable because it is the one decisionmaker that "stands between the individual and the power of the government." *Booker*, 543 U.S. at 237.

If this Court's recent decisions have made anything clear, it is that the right to jury trial is just as important in the context of factual determinations that expose defendants to heightened punishment as it is during the rest of trial. This Court explained in *Blakely* that the principle that juries must find every fact "the law makes essential of the punishment" has been "acknowledged by courts and treatises since the earliest days of graduated sentencing." *Blakely*, 542 U.S. at 302 (quotation and citation omitted). It continued:

> That right is no mere procedural formality, but a *fundamental reservation of power in our constitutional structure*. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.

Blakely, 542 U.S. at 305-06 (emphasis added). The *Blakely* rule is necessary, therefore, to prevent the jury from being "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07; *see also Jones v. United States*, 526 U.S. 227, 243-44 (1999) (absent such a rule "the jury's role would . . . shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping"). Like the right to counsel at issue in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court has identified as a watershed rule, *see Beard*, 542 U.S. at 417-18, the right to a jury

determination concerning every fact the law makes essential to punishment "may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon*, 372 U.S. at 344.

3. If there were any doubt that the *Blakely* rule satisfies the bedrock prong of *Teague*'s watershed exception, the *combination* of the reasonable doubt and jury-trial components would remove it. It is a truly rare decision of this Court that draws from the wellspring of two such fundamental elements of the American system of criminal justice.

Indeed, the extraordinary pedigree of the *Blakely* rule makes finding it a watershed rule entirely consistent with this Court's frequent observation that it is "unlikely that many such components of basic due process have yet to emerge." *Beard*, 542 U.S. at 417 (quoting *Graham*, 506 U.S. at 478 (quoting in turn *Teague*, 489 U.S. at 313)). This Court's holdings in *Apprendi* and *Blakely* did not discover any new constitutional rights. Rather, they required States that, in recent years, had adopted "novel[]" sentencing systems to reinstitute ancient procedural protections that States otherwise had followed since the founding and that had been recognized throughout the "uniform course of decision during the entire history of [this Court's] jurisprudence." *Apprendi*, 530 U.S. at 482-83, 490; *see also id.* at 501-18 (Thomas, J., concurring) (recounting common law jurisprudence in state courts); *Booker*, 543 U.S. at 236-37 (discussing States' recent shift in sentencing practices). As recently as 1980, in fact, the Washington Supreme Court had affirmed that "[o]ur cases involving . . . enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty."

State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980). The upshot of this history is that it is even more justifiable to apply a decision like *Blakely* retroactively than it would to apply a decision, such as *Gideon*, that created a new constitutional rule that States had no prior notice even existed.

That is not to say, of course, that every state prisoner sentenced in violation of *Blakely* should obtain federal habeas relief. Even within the presumably small group of those who are still in prison and procedurally able to raise such a claim in federal court, many will not be able to show that *Blakely* violations in their cases had a "substantial and injurious effect or influence" on their judgments. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). *Cf. Recuenco*, 126 S. Ct. at 2551-53 (*Blakely* errors may be deemed harmless at least when the State alleged the sentence enhancement at issue in the charging instrument and the issue was litigated at trial); *Booker*, 543 U.S. at 268 (*Booker* errors may be deemed harmless on appeal). But this reality does not give reason for refusing altogether to apply *Blakely* retroactively to such prisoners' claims. Convictions infringing the *Blakely* rule present "an impermissibly large risk," *Teague*, 489 U.S. at 312 (quoting *Desist*, 394 U.S. at 262 (Harlan, J., dissenting)), that the State of Washington is punishing someone for more serious conduct than he actually committed. A core purpose of the Great Writ is to provide a forum for identifying and remedying such injustices.

CONCLUSION

For the forgoing reasons, this Court should reverse the decision of the Court of Appeals and remand the case for further proceedings.

Respectfully submitted,

BRIAN TSUCHIDA
LAURA E. MATE
Federal Public Defender
Western District
of Washington
1601 Fifth Avenue
Suite 700
Seattle, WA 98101

JEFFREY L. FISHER
Counsel of Record
PAMELA S. KARLAN
STANFORD LAW SCHOOL
Supreme Court
Litigation Clinic
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

THOMAS C. GOLDSTEIN
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

AMY HOWE
KEVIN K. RUSSELL
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

August 2006

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

IN THE MATTER OF THE PERSONAL RESTRAINT OF: LONNIE BURTON, Petitioner.	No. 50246-8-I ORDER DISMISSING PERSONAL RESTRAINT PETITION (Filed May 7, 2002)

In 1991, Lonnie Burton forced a 15-year-old boy to have oral and anal intercourse with him. He then stole $160 from the dresser of the boy's parents. Burton was later convicted of first degree rape, first degree robbery, and first degree burglary. He has now filed this personal restraint petition contending the trial court erred in imposing a 562-month exceptional consecutive sentence for the rape, robbery, and burglary conviction. However, this court has previously dismissed at least one other petition in Cause No. 45074-3-I. Since it appears the issues raised in this petition are meritless either because they have previously been rejected by this court,[1] or are

[1] Petitioner contends the sentencing court miscalculated his offender score. The court rejected essentially the same issue on direct appeal in cause No. 42312-6-I. Moreover, post-conviction challenges must generally be brought within one year after a conviction becomes final. RCW 10.73.090, .100. While it appears the personal restraint petition was timely filed, the "Addendum to Personal Restraint Petition," in which the offender score issue is first raised, was not. *See In re Personal Restraint of Benn*, 134 Wn.2d 868, 938-39 952 P.2d 116 (1998). Because the claim is not exempt from the statute of limitations under RCW 10.73.100, *In re Personal Restraint Vehlewald*, 92 Wn. App. 197, 203, 963 P.2d 903 (1988), it is time-barred. *See Benn*, 134 Wn.2d at 939-40.

clearly controlled by settled law,[2] this successive petition is barred under RCW 10.73.140.[3]

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed.

Done this 7th day of May, 2002.

/s/ Cox, ACJ
Acting Chief Judge

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[2] Petitioner contends that the trial court erred in imposing an exceptional sentence upward under *Apprendi v. New Jersey*, 530 U.S., 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This issue is clearly controlled by the recent Supreme Court decision in *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001) (exceptional sentence may be imposed "without factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt"). Petitioner's attempt to distinguish *Gore* and its broad holding is not persuasive.

[3] *See In re Personal Restraint of Becker*, 143 Wn.2d 491, 20 P.3d 409 (2001).

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of LONNIE BURTON, Petitioner.	) RULING DENYING) REVIEW)) (Filed July 16, 2002))

Lonnie Burton seeks discretionary review of an order of the Acting Chief Judge of Division One of the Court of Appeals dismissing his personal restraint petition. RAP 16.14(c); RAP 13.5.

Mr. Burton argues that the trial court miscalculated his offender score. But he concedes this issue was raised and rejected on the merits on direct appeal. He does not show that the interests of justice require reconsideration of the issue. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Mr. Burton also challenges his exceptional sentence, relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But *Apprendi* does not apply to exceptional sentences that are otherwise within the statutory maximum for the crime. *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001). Mr. Burton argues *Gore* was wrongly decided, but he does persuasively show that to be the case.

The motion for discretionary review is denied.

/s/ Geoffrey Crooks
COMMISSIONER

July 16, 2002

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of LONNIE BURTON, Petitioner.	**ORDER** No. 72657-4 C/A No. 50264-8-I (Filed Oct. 8, 2002)

Department II of the Court (composed of Chief Justice Alexander and Justices Johnson, Sanders, Bridge and Owens) considered this matter at its September 4, 2002, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 8th day of October, 2002.

/s/ Gerry L. Alexander
CHIEF JUSTICE

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(6)

NO. 05-9222

FILED
OCT 2 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

Rob McKenna
Attorney General

Paul Douglas Weisser
Senior Counsel

William Berggren Collins
Carol A. Murphy
Deputy Solicitors General

John J. Samson*
Assistant Attorney General
**Counsel of Record*

PO Box 40116
Olympia, WA 98504-0116
360-586-1445

Counsel For Respondent

QUESTIONS PRESENTED

Petitioner received a consecutive sentence totaling 562 months—304 months for a rape conviction, 153 months for a robbery conviction, and 105 months for a burglary conviction. The terms that comprise the petitioner's sentence were within the standard range for each offense.

1. Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?

2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

PARTIES

The Petitioner is Lonnie L. Burton. The Respondent is Doug Waddington, Superintendent of the Washington Corrections Center.

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STATEMENT

Burton is a prisoner in custody under the judgment of a Washington state court. J.A. at 3–21. Burton challenges his custody in this habeas corpus proceeding, alleging his consecutive standard range sentences violate his Sixth and Fourteenth Amendment rights. Burton claims he should benefit from the retroactive application of the rule of *Blakely v. Washington*, 542 U.S. 296 (2004): if any fact, other than the fact of a prior conviction, increases the penalty for a crime beyond the maximum sentence a judge may impose solely on the basis of facts admitted or reflected in the jury verdict, then that fact must be submitted to the jury and proved beyond a reasonable doubt.

The judgment at issue was entered for Burton's 1994 convictions for rape, robbery and burglary. J.A. at 3–21. The Washington Court of Appeals affirmed the three convictions on direct appeal, but remanded for re-sentencing. *State v. Burton*, 86 Wash. App. 1046, 1997 WL 306429 (1997), *review denied*, 133 Wash. 2d 1025, 950 P.2d 475 (1997), *cert. denied sub nom. Burton v. Washington*, 523 U.S. 1082 (1998). As directed, the state trial court re-sentenced Burton, and the court entered the second amended judgment and sentence on March 16, 1998. J.A. at 3–21.

In the amended judgment, the trial court imposed a sentence for each offense that fell within the standard sentencing range for the particular offense. J.A. at 6, 9. The standard range for the rape offense was 234 to 304 months, and the court sentenced Burton to 304 months for the rape

conviction. J.A. at 6, 9. The standard range for the robbery offense was 153 to 195 months, and the court sentenced Burton to 153 months for the robbery conviction. J.A. at 6, 9. The standard range for the burglary offense was 105 to 134 months, and the court sentenced Burton to 105 months for the burglary conviction. J.A. at 6, 9.- The trial court then ran the individual sentences for each offense consecutively, rather than concurrently, for a cumulative total sentence of 562 months. J.A. at 9. The trial court ran the sentences consecutively based upon the "multiple offense policy", and the state appellate courts concluded this policy alone justified the consecutive sentences. J.A. at 30, 52–53.[1]

Under the multiple offense policy, the court will generally run sentences for multiple current offenses concurrently, but the court may chose to run the sentences consecutively when the combination of concurrent sentences and a defendant's high offender score will result "in 'free crimes'—crimes for which there is no additional penalty." *State v. Smith*, 123

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[1] Contrary to the suggestion in Burton's brief, the aggravating factor of deliberate cruelty at issue in *Blakely* is not an issue in this case. The trial court imposed an alternative sentence above the standard range, but the Washington Court of Appeals vacated the alternative sentence, finding it invalid under state law. J.A. at 9, 53. In addition, although the trial court found multiple factors to support the second amended judgment and sentence (*see* J.A. at 7, 9, 22–33), the Washington Court of Appeals relied solely upon the multiple offense policy to affirm the trial court's decision to impose consecutive sentences. J.A. at 50–53. Since the appellate court did not rely on either the alternative sentence, or the other aggravating factors cited by the trial court, those facts are not relevant here. *Blakely*, 542 U.S. at 300 n.4.

Wash. 2d 51, 56, 864 P.2d 1371 (1993) (quoting *State v. Stephens*, 116 Wash. 2d 238, 243, 803 P.2d 319 (1991)); *see also* Wash. Rev. Code § 9.94A.589(1)(a) (formerly Wash. Rev. Code § 9.94A.400); Wash. Rev. Code § 9.94A.535(2)(c). Under the multiple offense policy, the court may run sentences consecutively if concurrent sentences would result in some of the current convictions going unpunished. *Smith*, 123 Wash. 2d at 55–56.

Burton's criminal record gave him an offender score of 16 for the rape conviction. J.A. at 26; Wash. Rev. Code § 9.94A.525. This offender score placed Burton over the sentencing grid's top end "9 or more" offender score category. Wash. Rev. Code § 9.94A.510. If the trial court had imposed concurrent sentences for the rape, robbery and burglary convictions, Burton would be punished for the rape conviction, but not for his robbery and burglary convictions. J.A. at 27. The trial court imposed consecutive sentences so that Burton was punished for each of the crimes of which he was convicted by the jury beyond a reasonable doubt, thereby avoiding free crimes. J.A. at 27, 50–52. Burton appealed the second amended judgment and sentence to the Washington Court of Appeals. *See* J.A. at 45.

In December of 1998, while the direct appeal remained pending in the Washington state courts, Burton filed his first federal habeas corpus petition, challenging his custody under the second amended judgment and sentence. J.A 34–41. The 1998 federal petition challenged the validity of Burton's three convictions. J.A. at 39. The district court denied the petition with prejudice on April 6,

2000. J.A. at 42. The Ninth Circuit affirmed the district court's judgment dismissing the petition. *Burton v. Walter*, No. 00-35579, 2001 WL 1243655 (9th Cir. May 30, 2001).

On July 17, 2000, the Washington Court of Appeals issued an opinion affirming the second amended judgment and sentence. J.A. at 43–54. The Washington Supreme Court denied review on December 5, 2000. J.A. at 55.

In January 2002, Burton initiated this action, filing a second habeas corpus petition challenging his custody under the second amended judgment and sentence. *See* J.A. at 56. Burton had not obtained permission from the Ninth Circuit to file the petition as required by 28 U.S.C. § 2244(b). Respondent answered the petition, arguing that the district court lacked jurisdiction because Burton had not obtained leave to file the petition. Respondent also addressed the merits of Burton's claims.

The United States Magistrate Judge issued a report and recommendation, recommending that the district court deny the petition. J.A. at 56–76. The magistrate judge concluded the current petition was not barred under 28 U.S.C. § 2244(b), but also concluded that Burton was not entitled to relief on the merits of his claims. J.A. at 56–76. Burton objected to the report and recommendation. Respondent filed a response, again arguing the district court lacked jurisdiction. The district court adopted the report and recommendation, and denied the 2002 habeas corpus petition.[2] J.A. at 77. Burton

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[2] During the course of the current federal proceedings, the Washington state courts denied a personal restraint

appealed from the district court's judgment to the Ninth Circuit.

While the appeal was pending in the Ninth Circuit, this Court issued the decision in *Blakely v. Washington*, 542 U.S. 296 (2004), on June 24, 2004, and the decision in *United States v. Booker*, 543 U.S. 220 (2005), on January 12, 2005. The Ninth Circuit directed the parties to submit supplemental briefing addressing the effect, if any, of *Blakely* and *Booker* on Burton's appeal. Respondent argued the rule in *Blakely* did not apply because *Blakely* announced a new rule that was not clearly established either at the time the state court judgment became final, or at the time of the state court adjudication of Burton's claim. Respondent also argued that, even if *Blakely* did apply, Burton's sentence did not violate the holding of *Blakely* because no fact was found by the judge that increased it beyond the statutory maximum. After considering the supplemental arguments, the Ninth Circuit affirmed the district court's judgment. J.A. at 78–82. The Ninth Circuit held that *Blakely* did not apply retroactively in habeas corpus proceedings. J.A. at 81 (citing *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005)). The Ninth Circuit ruled the state court decision that Burton's sentence was constitutional was a reasonable application of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). J.A. at

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petition challenging the second amended judgment and sentence. The records from this state court collateral challenge were not made a part of the federal court record, but Burton has appended some of the records to his opening brief. Petr.'s Br. at 1a–4a.

81–82. The Ninth Circuit denied Burton's petition for rehearing and rehearing *en banc*. J.A. at 83.

SUMMARY OF THE ARGUMENT

Burton is not entitled to relief because his petition is barred as a second or successive petition under 28 U.S.C. § 2244(b). In 1998, Burton filed his first habeas petition, challenging his convictions under the state court judgment. The lower courts denied the petition on the merits. In 2002, Burton filed this second petition, this time challenging the sentence under the same state court judgment. The 2002 petition was a second or successive petition, and 28 U.S.C. § 2244(b) required Burton to obtain authorization from the Ninth Circuit to file the 2002 petition. Since the Ninth Circuit did not authorize the filing of the 2002 petition, the district court lacked jurisdiction to consider the petition.

Burton also is not entitled to relief because *Blakely* created a new rule which does not apply retroactively in a habeas corpus proceeding. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that a sentence above a traditional statutory maximum must be based upon facts found by a jury beyond a reasonable doubt. In *Blakely*, the Court extended *Apprendi* and held for the first time that any fact (other than a prior conviction) used to impose a sentence above a standard sentencing range, but below a traditional statutory maximum, must be proven to the jury beyond a reasonable doubt. Until the Court issued *Blakely*, this rule was not dictated by the Court's precedent. The vast majority of reasonable jurists believed *Apprendi* did not extend to sentences above a standard range but

below a traditional statutory maximum. The *Blakely* Court therefore imposed a new obligation that was not dictated by precedent. In doing so, *Blakely* created a new rule.

This new rule does not apply retroactively in a habeas proceeding because the rule does not fall within the narrow exceptions to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). The *Blakely* rule does not qualify as a retroactive watershed rule because it is not a fundamental rule altering our understanding of "bedrock procedural elements", and it does not seriously enhance the likelihood of obtaining an accurate conviction. The error in *Blakely* does not constitute a jurisdictional defect equivalent to the fundamental error in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Since a sentencing proceeding conducted without the protections of *Blakely* can still be a fundamentally fair proceeding, and can still result in an accurate sentence, *Blakely* is not a watershed rule.

The new *Blakely* rule also does not apply retroactively under 28 U.S.C. § 2254(d) because the rule was not clearly established federal law in cases adjudicated prior to the issuance of the *Blakely* decision. The habeas statute specifically limits relief to claims based upon a holding of the Court in existence at the time of the state court adjudication. The habeas statute does not authorize a grant of relief based upon the retroactive application of later decided Supreme Court opinions. Since *Blakely* did not exist at the time of the state court adjudication of Burton's claims, Burton may not obtain relief on a claim asserting a *Blakely* violation.

Finally, even if the Court applied *Blakely* retroactively, Burton is not entitled to relief because the state court decision that Burton's sentence is constitutional is a reasonable application of *Blakely*. *Blakely* did not hold that consecutive standard range sentences violate the Constitution. The Court's holding simply did not establish the rule advanced by Burton's claim. Because the rule sought by Burton is not based upon an express holding of the Court, Burton is not entitled to relief.

ARGUMENT

A. The Court Should Dismiss The Writ As Improvidently Granted Because Relief Is Barred Under 28 U.S.C. § 2244(b)

Burton is not entitled to relief in this habeas corpus proceeding. The current habeas corpus petition is a second or successive petition, and Burton did not comply with the gate-keeping requirement of 28 U.S.C. § 2244(b). The district court therefore lacked jurisdiction to consider Burton's petition.[3]

The statute governing second and successive petitions is explicit. A claim presented in a second or successive habeas corpus petition that was not presented in a prior petition shall be dismissed unless the new claim falls within one of two narrow exceptions. 28 U.S.C. § 2244(b)(2); *Tyler v. Cain*, 533 U.S. 656, 661 (2001). The claim must rely on a new rule of constitutional law made retroactive to cases on collateral review by this Court, or it must rely

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[3] Respondent raised this issue in his brief in opposition to the petition for a writ of certiorari. Resp't's Br. Opp'n at 5–7.

upon a factual predicate that could not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2); *Tyler*, 533 U.S. at 661–62. The statute is also explicit that, before a petitioner may file a second or successive petition in the district court, the petitioner must first obtain an order from the court of appeals authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A); *Tyler*, 533 U.S. at 664; *Felker v. Turpin*, 518 U.S. 651, 657 (1996). The district court may not consider a successive petition unless and until the circuit court authorizes the filing of the petition. 28 U.S.C. § 2244(b)(3)(A).

On December 28, 1998, Burton filed his first federal petition challenging his custody under the second amended judgment and sentence. J.A. at 34. This 1998 petition challenged the validity of the convictions, but not the sentence, under the second amended judgment and sentence. J.A. at 34–41. The district court denied the 1998 petition on the merits. J.A. at 42. In 2002, Burton filed his current petition, again challenging his custody under the second amendment judgment and sentence. *See* J.A. at 56. The 2002 petition challenged the validity of the sentence, but not the convictions. *See* J.A. at 56. While the 1998 petition challenged the convictions and the 2002 petition challenged the sentence, it is undisputed that Burton's two habeas corpus petitions challenged the same custody imposed by the same state court judgment. Because Burton had previously filed an application for habeas corpus relief challenging this custody, Burton had to obtain authorization from the Ninth Circuit to file the 2002 petition. 28 U.S.C. § 2244(b)(3)(A). The

district court lacked jurisdiction because Burton did not obtain authorization to file the 2002 petition.

The Ninth Circuit incorrectly concluded the 2002 petition was not a second or successive petition because Burton had not yet exhausted his current claims when he filed the earlier petition in 1998. J.A. at 79. In reaching this conclusion, the Ninth Circuit erroneously determined the non-exhaustion of the sentencing claims gave Burton a "'legitimate excuse for failing to raise a claim at the appropriate time.'" J.A. at 79 (quoting *McCleskey v. Zant*, 499 U.S. 467, 490 (1991)). However, the language cited from *McCleskey* did not mean that the non-exhaustion of a claim excused the filing of a petition after a prisoner had previously litigated the merits of a first petition. On the contrary, the cited language and the remaining opinion in *McCleskey* established that a petitioner must satisfy the cause and prejudice or actual innocence standard in order to avoid an "abuse of the writ" when filing a second petition. *McCleskey v. Zant*, 499 U.S. 467, 489–502 (1991). The strict standard adopted in *McCleskey* was later replaced by an even stricter standard in 28 U.S.C. § 2244(b).

Contrary to the Ninth Circuit's conclusion, this Court has never held that a lack of exhaustion excuses a failure to raise new claims in an earlier petition. Instead, the Court has repeatedly warned prisoners that, by proceeding with only exhausted claims in a first petition, a prisoner risks dismissal under the abuse of the writ doctrine if he or she returns to federal court with later exhausted claims. *Rose v. Lundy*, 455 U.S. 509, 521 (1982) (plurality

opinion); *McCleskey*, 499 U.S. at 489; *Slack v. McDaniel*, 529 U.S. 473, 486–87 (2000).

The phrase "second or successive petition" is a term of art, and the Court's decision in *Rose* "instructs us in reaching our understanding of the term." *Slack*, 529 U.S. at 486. Establishing a total exhaustion rule, *Rose* held that a district court must dismiss a habeas petition containing both exhausted and unexhausted claims. *Rose*, 455 U.S. at 522 (plurality opinion). The requirement to dismiss a "mixed petition" left the prisoner with the choice of returning to state court to exhaust state remedies, or amending the petition to present only exhausted claims to the district court. *Rose*, 455 U.S. at 510, 520. A prisoner who chose to return to state court to exhaust state remedies, rather than proceeding with only the exhausted claims in federal court, could later file a new habeas petition containing all the claims without facing the abuse of the writ doctrine. *Slack*, 529 U.S. at 486.

On the other hand, if the prisoner chose to proceed forward in district court with only the exhausted claims, "the prisoner would risk forfeiting consideration of his unexhausted claims in federal court." *Rose*, 455 U.S. at 520. *Rose* explicitly warned prisoners that a subsequently filed petition faced dismissal as an abuse of the writ. *Id.* at 521; *Slack*, 529 U.S. at 486–87. "Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." *Rose*, 455 U.S. at 521. "[T]he fact that a claim is not exhausted does not justify the deliberate withholding of the claim from a federal habeas petition." *Floyd v.*

Alexander, 148 F.3d 615, 618 (6th Cir. 1998) (citing *Herbst v. Scott*, 42 F.3d 902, 906 (5th Cir. 1995)); *Tyler v. Armontrout*, 917 F.2d 1138, 1140–41 (8th Cir. 1990); *Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988); *McCorquodale v. Kemp*, 832 F.2d 543, 545–46 (11th Cir. 1987)).

Rose clearly instructs us that Burton's 2002 petition is a "second or successive petition." The state trial court entered the second amended judgment and sentence in March 1998, eight months before Burton filed his 1998 habeas corpus petition. By the time Burton filed his 1998 petition, he knew or should have known the basis of the sentencing claims he would later raise in his 2002 habeas petition. Rather than including the sentencing claims in the 1998 petition, Burton chose to pursue only claims challenging his convictions. J.A. at 34–41. Burton delayed raising the sentencing claims until 2002. The fact that the sentencing claims were not yet exhausted in 1998 does not alter the conclusion that the 2002 petition is a "second or successive petition."

Contrary to the arguments raised in Burton's reply to the brief in opposition, Burton could have raised the claims in a single petition. Burton could have chosen to raise all of his claims in the 1998 petition. In the alternative, Burton could have finished exhausting his state court remedies, and raised all of his claims in the 2002 petition. If Burton had chosen either of these options, Burton could have avoided filing a "second or successive petition."

If Burton had raised the unexhausted claims in the first petition, the district court could have

stayed the first petition to allow Burton an opportunity to exhaust the unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 273–79 (2005) (court may hold petition in abeyance to allow exhaustion); *Pace v. DiGuglielmo*, 544 U.S. 408, 416–17 (2005) (recognizing the abeyance procedure may be utilized to avoid any concerns raised by the statute of limitations). In such a case, Burton could have pursued all of his claims, challenging both the convictions and the sentence, in a single petition. Although Burton argued in his reply to the brief in opposition that it was unclear in 1998 if the district court could stay a habeas corpus petition (*see* Reply at 10), the Ninth Circuit had held as early as 1993 that a district court should stay a petition in order to allow exhaustion of state remedies. *Fetterly v. Paskett*, 997 F.2d 1295, 1301–02 (9th Cir. 1993). And the Ninth Circuit reaffirmed this ruling several months before Burton filed his 1998 petition. *Calderon v. United States Dist. Court* (*Thomas*), 144 F.3d 618, 620 (9th Cir. 1998) (citing *Calderon v. United States Dist. Court* (*Taylor*), 134 F.3d 981, 987–88 (9th Cir. 1998)). Burton could have avoided the successive petition issue by filing a single petition in 1998 raising all of his claims.

If Burton had raised all of his claims in the 1998 petition, it is possible that Respondent might have waived the exhaustion requirement since exhaustion is not jurisdictional and the Court's opinions in 1998 did not support Burton's sentencing claims. *See* 28 U.S.C. § 2254(b)(2) (court may deny claim on the merits despite failure to exhaust). Respondent may have asked the court to deny the claims despite the lack of exhaustion since the claims

were not based upon clearly established federal law. Even if Respondent had not waived exhaustion, inclusion of the sentencing claims in the 1998 petition would have made it a mixed petition, containing exhausted and unexhausted claims. If the court did not stay the petition, the court would have dismissed the petition without prejudice as a mixed petition. Burton then could have returned to federal court after exhausting his sentencing claims. *Slack*, 529 U.S. at 486–88.

Burton also could have chosen not to file a federal petition until he exhausted all of his claims. The statute of limitations did not begin to run on any of Burton's claims until March 5, 2001, when the second amended judgment became final on the conclusion of direct review. 28 U.S.C. § 2254(d)(1). The statute of limitations did not expire until one year later, on March 5, 2002. Burton filed his current petition in January 2002, well within the statute of limitations. Burton could have chosen to wait until he filed his 2002 petition to raise all of his claims in a single petition. Although Burton argued in his reply to the brief in opposition that it was unclear in 1998 when the statute of limitation might begin to run, this alleged confusion is not a basis for ignoring the statutory requirements of 28 U.S.C. § 2244(b). *Pace*, 544 U.S. at 416–17.

Burton had several options to avoid filing a second or successive petition, but he chose none of these options. Instead, Burton chose to file a petition in 1998, challenging his convictions, but not his sentence. The district court considered the 1998 petition on the merits, and denied the petition with prejudice. Consequently, Burton's current petition,

filed in 2002, is a second or successive petition. The district court therefore lacked jurisdiction to consider the 2002 petition because the Ninth Circuit had not issued an order authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A).

Even if Burton had filed a motion seeking authorization to file his 2002 petition, the Ninth Circuit could not have granted such authorization. The sentencing claims raised in Burton's 2002 petition did not satisfy the new rule exception to 28 U.S.C. § 2244(b) since this Court has not "made" the new rule of *Blakely* retroactive in a holding of the Court. *Tyler*, 533 U.S. at 662–67.

Because the 2002 petition was a second application for habeas corpus relief, the district court was required to dismiss the petition. *Tyler*, 533 U.S. at 667–68. The Court cannot decide in this case whether *Blakely* "is retroactive to cases on collateral review, because that decision would not help [Burton] in this case." *Id.* at 668. "Any statement on [*Blakely's*] retroactivity would be dictum . . . ." *Id.*

B. *Blakely* Does Not Apply Retroactively In Federal Habeas Corpus Proceedings

Blakely created a new rule by imposing on state courts a new obligation that reasonable jurists overwhelmingly believed was not dictated by prior precedent. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court "held that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *See Washington v. Recuenco*, 126 S. Ct. 2546, 2549 (2006). (quoting *Apprendi*, 530

U.S. at 490). Thus, *Apprendi* contemplated a traditional statutory maximum. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court expanded *Apprendi* and for the first time "clarified that 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*'" *Recuenco*, 126 S. Ct. at 2549 (quoting *Blakely*, 542 U.S. at 303). This new rule does not apply retroactively in a habeas proceeding because the rule does not fall within the narrow exceptions to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989).

1. *Teague* Non-Retroactivity Standard

Where the State claims that relief is barred under the non-retroactivity doctrine of *Teague*, a federal court must proceed in three steps. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). "First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes." *Id.* A state court judgment becomes final for retroactivity analysis when the time for filing a petition for writ of certiorari has elapsed or a timely-filed petition has been finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). "Second, the court must survey the legal landscape as it then existed, and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." *Caspari*, 510 U.S. at 390 (citations omitted) (internal quotation marks omitted) (quoting *Graham v. Collins*, 506 U.S. 461,

468 (1993); *Saffle v. Parks*, 494 U.S. 484, 488 (1990)). Unless reasonable jurists would have felt compelled by existing precedent to grant relief, the federal court is precluded from granting relief. *Goeke v. Branch*, 514 U.S. 115 (1995); *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Third, the court must decide whether the new rule falls within one of the narrow exceptions to the non-retroactivity doctrine. *Caspari*, 510 U.S. at 390.

2. *Blakely* Created A New Rule

Aptly described by Justice O'Connor as a "number 10 earthquake" (*see* David E. Johnson, *Justice For All: Analyzing Blakely Retroactivity And Ensuring Just Sentences In Pre-Blakely Convictions*, 66 Ohio St. L.J. 875, 884 (2005)), the *Blakely* decision sent shockwaves across the nation. *Blakely* altered the legal landscape that had existed for more than two decades, invalidating the fact finding process used in determinate sentencing systems. *See Simpson v. United States*, 376 F.3d 679, 680–81 (7th Cir. 2004). *Blakely* created a new rule.[4]

"'A case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Caspari*, 510 U.S. at 390 (quoting *Teague*, 489 U.S. at 301). A rule is new "when it breaks new grounds or imposes a new obligation on the States or the Federal

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[4] The non-retroactivity doctrine of *Teague* is distinct from 28 U.S.C. § 2254(d) (*see Horn v. Banks*, 536 U.S. 266, 272 (2002)), but the Court has applied a similar standard for determining whether a rule is an "old rule" under *Teague*, and "clearly established Federal law" under 28 U.S.C. § 2254(d)(1). *Williams*, 529 U.S. at 412.

Government." *Teague*, 489 U.S. at 301. A decision creates a new rule unless reasonable jurists would have felt compelled by existing precedent to grant the relief required by the new rule. *Saffle*, 494 U.S. at 488. Application of an old rule in a new setting, or in a manner not dictated by precedent, constitutes the creation of a new rule. *Stringer v. Black*, 503 U.S. 222, 228 (1992). Even if application of the existing rule in the novel situation may be considered "governed" by prior precedent, the new application of the rule still creates a new rule. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

The "new rule" principle protects the reasonable judgments of state courts, and the State's interest in the finality of judgments. *Beard v. Banks*, 542 U.S. 406, 413 (2004). The principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414. The principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). This principle serves the primary function of habeas corpus, which is "to ensure that state convictions comport with the *federal* law that was established at the time petitioner's conviction became final." *Id.* at 239.

Extending precedent so as to apply an old rule in a novel setting does as much harm to the interests of finality, predictability, and comity as does the invocation of a new rule that was not dictated by precedent. *Stringer*, 503 U.S. at 228. If courts could

grant relief by simply extending an old rule in a novel manner not dictated by precedent, the function of habeas corpus review would be severely compromised. This is especially true under the current standards imposed by 28 U.S.C. § 2254(d)(1), which prohibit relief unless the state court decision on the constitutional issue was an unreasonable application of the Supreme Court precedent in existence at the time of the state court adjudication. As the Court previously recognized, "[s]ection 2254(d) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

Thus, whether the Court is establishing a new rule in the first instance, or extending an existing rule to a new situation, the Court must "'determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution.'" *Caspari*, 510 U.S. at 390 (quoting *Saffle*, 494 U.S. at 488). The Court "will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Since reasonable jurists did not believe the Court's precedent required the extension of the *Apprendi* rule in the manner later adopted in *Blakely*, the Court's decision in *Blakely* established a new rule.

In *Butler*, Butler sought relief based upon the retroactive application of this Court's decision in *Arizona v. Roberson*, 486 U.S. 675 (1988). *Butler*, 494 U.S. at 408–09. In *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), the Court had held that, upon a request for counsel, police must cease an interrogation and may not reinitiate questioning until counsel is provided to the defendant. Declining to craft an exception to the *Edwards* rule, the *Roberson* Court held the fifth amendment bars the police from reinitiating any interrogation following a request for counsel even in the context of a separate investigation. *Roberson*, 486 U.S. at 677–78. Seeking habeas relief, Butler argued that *Teague* did not bar retroactive application of *Roberson* because the decision did not announce a new rule. *Butler*, 494 U.S. at 414. Butler argued the *Roberson* decision was merely an application of *Edwards* to a slightly different set of facts. *Id.* In support of this argument, Butler pointed out that *Roberson* was "directly controlled by *Edwards*", that *Roberson* was within the "logical compass" of "*Edwards*", and that *Roberson* concerned Arizona's attempt to create an "exception" to *Edwards*. *Id.* at 414–15. Rejecting Butler's argument, the Court held that *Roberson* established a new rule of criminal procedure because it was not dictated by *Edwards*. *Id.* at 415. "[T]he fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*." *Id.* The Court concluded the outcome in *Roberson* was susceptible to debate among reasonable minds, as evidenced by

the differing opinions taken by the judges of the Fourth and Seventh Circuits. *Butler*, 494 U.S. at 415.

Similarly, in *Caspari*, the Eighth Circuit had held that a non-capital sentence enhancement violated the double jeopardy rule established for capital sentencing in *Bullington v. Missouri*, 451 U.S. 430 (1981). *Caspari*, 510 U.S. at 387. Applying the *Bullington* rule, the Eighth Circuit found "'it is a short step to apply the same double jeopardy protection to a non-capital sentencing hearing as the Supreme Court applied to a capital sentencing hearing.'" *Id.* at 388. The Eighth Circuit believed this short step did not require the announcement of a new rule and, thus, did not violate the non-retroactivity doctrine of *Teague*. *Id.* Reversing, this Court noted that it had not applied the double jeopardy rule to a non-capital case, and that several courts had reached conflicting decisions on this issue. *Id.* at 393–95. The Court found the lack of Supreme Court authority, and the split of authority amongst the lower courts, demonstrated the application of the old rule in this new manner required the announcement and application of a new rule. *Id.*

The fact that the Court's opinions did not foreclose application of *Apprendi* in the manner established in *Blakely* is not significant. *Caspari*, 510 U.S. at 393. What is significant, especially under the constraints of 28 U.S.C. § 2254(d)(1), is that until *Blakely*, the Court had never applied *Apprendi* in the context of a determinate sentence which fell above a standard range, but below a pre-*Blakely* traditional statutory maximum, and the Court's precedent did not *dictate* that *Apprendi*

applied to such a sentence. *Caspari*, 510 U.S. at 393; *see also Kane v. Espitia*, 126 S. Ct. 407, 408 (2005) (the fact that a rule may be implied from the Court's opinion is not sufficient a basis for granting habeas corpus relief under 28 U.S.C. § 2254(d)).

Apprendi itself concerned only a sentence above the traditional statutory maximum for an offense. *Apprendi v. New Jersey*, 530 U.S. 466, 469–69 (2000). The Court specifically noted it was expressing no view on whether the rule applied to determinate sentencing schemes. *Id.* at 497 n.21. Also, the dissent noted that *Apprendi* failed to "clarify the contours of the constitutional principle underlying its decision." *Id.* at 540 (O'Connor, J., dissenting). The dissent identified "several plausible interpretations of the constitutional principle on which the Court's decision rests." *Id.* Under one interpretation of *Apprendi*, the interpretation later adopted by the vast majority of lower courts, judges could still find facts and impose sentences above a statutory standard sentencing range so long as the sentence did not exceed the traditional statutory maximum. *Id.* at 540–41. *Apprendi* did not dictate the result in *Blakely* since under a reasonable interpretation of *Apprendi*:

> "A State could, however, remove from the jury (and subject to a standard of proof below 'beyond a reasonable doubt') the assessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced." *Apprendi*, 530 U.S. at 540 (O'Connor, J., dissenting).

In determining whether *Apprendi* dictated the result in *Blakely*, it is also significant that *Blakely* itself resulted in a 5/4 split. While the mere existence of a dissent does not suffice to show that a rule is new, the fact that four justices dissented in *Blakely* shows that reasonable jurists could and did differ on whether *Apprendi* applied to determinate sentencing. *Beard*, 542 U.S. at 416 n.5.

The vast majority of lower courts did not believe *Apprendi* applied to determinate sentences below a traditional statutory maximum. Prior to *Blakely*, "only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme." *Blakely v. Washington*, 542 U.S. 296, 320 n.1 (2004) (O'Connor, J., dissenting) (citing cases); *see also Schardt v. Payne*, 414 F.3d 1025, 1035 (9th Cir. 2005) (citing cases); *United States v. Price*, 400 F.3d 844, 847–48 (10th Cir. 2005) (citing cases). In addition, the vast majority of courts since *Blakely* have held that the Court created a new rule. *See, e.g., Schardt*, 414 F.3d at 1034–35 (citing cases); *Price*, 400 U.S. at 847–48 (citing cases); *Simpson*, 376 F.3d at 681; *State v. Houston*, 702 N.W.2d 268, 273 (Minn. 2005); *State v. Evans*, 154 Wash. 2d 438, 114 P.3d 627 (2005); *State v. Febles*, 210 Ariz. 589, 591, 115 P.3d 629 (Ct. App. 2005). The overwhelming agreement of jurists that *Apprendi* did not apply to sentences above a standard range but within the traditional statutory maximum, and the agreement that *Blakely* created a new rule, demonstrates that *Blakely* is a new rule. *O'Dell*, 521 U.S. at 166 n.3 (prior decisions of state and federal courts reaching opposite conclusion demonstrated

that *Simmons v. South Carolina*, 512 U.S. 154 (1994), created a rule).

Burton argues *Blakely* did not create a new rule because the Court simply applied *Apprendi* to an exceptional sentence in a determinate sentencing system. In support of this argument, Burton relies on the Court's decisions in *Francis v. Franklin*, 471 U.S. 307 (1985), *Stringer v. Black*, 503 U.S. 222 (1992), and *Penry v. Lynaugh*, 492 U.S. 302 (1989). These cases involve application of an existing rule in a similar situation with slightly different facts.

Burton argues that this case is like *Francis*, *Stinger*, and *Penry* because *Blakely* simply applied the principle of *Apprendi* that the definition of the term "statutory maximum" was the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Petr.'s Br. at 19. However, this principle was not clearly established in *Apprendi* since reasonable jurists did not believe *Apprendi's* "statutory maximum" language included the top end of standard ranges in a determinate sentencing scheme. *See Washington v. Recuenco*, 126 S. Ct. 2546, 2549 (2006) (*Blakely* clarified the term "statutory maximum").[5]

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[5] *United States v. Whooten*, 279 F.3d 58, 60 (1st Cir. 2002) ("*Apprendi* only applies when a defendant's sentence exceeds the statutory maximum . . . *Apprendi* does not prevent a sentencing judge from making factual findings that increase a defendant's sentence, as long as such an increase falls within the statutory maximum." (citations omitted)); *United States v. Szur*, 289 F.3d 200, 219 (2d Cir. 2002) ("The constitutional rule of *Apprendi* does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense

of conviction." (quoting *United States v. Thomas*, 274 F.3d 655, 664 (2d Cir. 2001)); *United States v. DeSumma*, 272 F.3d 176, 181 (3d Cir. 2001) ("This Court has since concluded, however, that when the actual sentence imposed does not exceed the statutory maximum, *Apprendi* is not implicated."); *United States v. Kinter*, 235 F.3d 192, 199–200 (4th Cir. 2000) ("[A]ll of the Courts of Appeals to have considered the issue have thus far agreed, that to find the 'prescribed statutory maximum' as contemplated in *Apprendi*, one need only look to the language of the statute criminalizing the offense, and no further."); *United States v. Randle*, 304 F.3d 373, 378 (5th Cir. 2002) ("*Apprendi* does not apply to judge-made determinations pursuant to the Sentencing Guidelines. . . . Because *Apprendi* only addresses facts that increase the penalty for a crime beyond the statutory maximum, it does not apply to those findings that merely cause the guideline range to shift within the statutory range."); *United States v. Helton*, 349 F.3d 295, 299 (6th Cir. 2003) ("*Apprendi* do[es] not apply to the Sentencing Guidelines when the defendant's sentence remains below the *maximum* sentence authorized by statute."); *United States v. Johnson*, 335 F.3d 589, 591 (7th Cir. 2003) ("The Supreme Court's decision in *Apprendi* establishes the general rule that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. However, a particular sentence does not implicate *Apprendi* unless it exceeds a default statutory maximum." (citation omitted)); *United States v. Piggie*, 316 F.3d 789, 791 (8th Cir. 2003) ("[T]he rule of *Apprendi* only applies where the non-jury factual determination increases the maximum sentence beyond the statutory range authorized by the jury's verdict."); *United States v. Sullivan*, 255 F.3d 1256, 1265 (10th Cir. 2001) ("*Apprendi* does not apply to sentencing factors that increase a defendant's guideline range but do not increase the statutory maximum."); *United States v. Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003) ("[I]n *Apprendi*, the Supreme Court held that any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *United States v. Weaver*, 281 F.3d 228, 234 (D.C. Cir. 2002) ("We have, on

Even this Court's opinions issued after *Apprendi* but prior to *Blakely* did not indicate that the rule subsequently announced in *Blakely* was dictated by *Apprendi*. For example, in *Harris v. United States*, 536 U.S. 545 (2002) the Court considered the application of *Apprendi* to a statutorily imposed minimum sentence. The *Harris* Court cited *Apprendi* for the proposition that, under the jury's verdict in *Apprendi*, "the Government has been authorized to impose any sentence below the maximum." *Harris*, 536 U.S. at 565. Although the *Harris* Court repeatedly referred to *Apprendi's* statutory maximum sentence, the *Harris* Court never indicated that the statutory maximum meant anything less than a traditional statutory maximum, rather than the maximum sentence a judge may impose solely on the basis of facts admitted or reflected in the jury verdict. *Id.* at 562–68 (referring to the 10-year statutory maximum at issue in the New Jersey statute). The *Harris* Court never said *Apprendi's* "statutory maximum" meant the top end of a standard sentencing range below the traditional statutory maximum. *Harris*, 536 U.S. at 562–68.

Burton claims that the Washington Supreme Court's decision applying *Apprendi* was a decision no reasonable jurist would have made. Petr.'s Br. at 22. But the reasoning of the Washington Supreme Court was the same as the decisions of the circuit

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numerous occasions, refused to extend *Apprendi* beyond its holding that any factor other than a prior conviction triggering a sentence above the statutory maximum must be submitted to and found by a jury.").

courts. Like the federal courts, the Washington Supreme Court concluded that exceptional determinate sentences complied with *Apprendi* because such sentences were still within the maximum sentence authorized by the statute. *State v. Gore*, 143 Wash. 2d 288, 314, 21 P.3d 262, 277 (2001) ("The state statutory scheme permits a judge to impose an exceptional sentence—still within the range determined by the Legislature and not exceeding the maximum—after considering the circumstances of an offense . . . .").

Burton attempts to distinguish the decisions of the federal circuit courts because they dealt with the federal sentencing guidelines, which were not imposed by statute. Petr.'s Br. at 23–24. This argument is not well taken for two reasons. First, this Court acknowledged in *United States v. Booker*, 543 U.S. 220, 233 (2005), that "the dissenting opinions in *Blakely* recognized that there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*.]" In "both systems . . . the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." *Booker*, 543 U.S. at 221. Prior to *Blakely*, the reasoning of the courts was that the same sentencing factors were permissible, so long as the sentence did not exceed the statutory maximum.

Second, even if the decisions of the Circuit Courts could be distinguished because the federal guidelines were not statutory, reasonable jurists in other state courts reached the same conclusion in

upholding sentencing systems that did not involve the federal guidelines.[6]

Burton also argues that *Blakely* recognized that it was merely applying the rule in *Apprendi*, focusing on the language in *Blakely* that this "case requires us to apply the rule we expressed in *Apprendi*." *Blakely v. Washington*, 542 U.S. 296, 301 (2004); Petr.'s Br. at 19. This language is not determinative of the question. As discussed above, the fact is that courts "frequently view their decisions as 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts." *Butler v. McKellar*, 494 U.S. 407, 415 (1990). *Supra* p. 20.

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[6] *Altman v. State*, 852 So. 2d 870, 876 (Fla. Dist. Ct. App. 2003) ("Appellant . . . argues that the determination of victim injury sexual contact points should have been submitted to the jury and proven beyond a reasonable doubt, as required by *Apprendi*. This argument fails, however, because appellant's sentence did not exceed the statutory maximum penalty." (citation omitted)); *State v. Armour*, 874 So. 2d 304, 311 (La. Ct. App. 2004) ("The jurisprudence has recognized that when, as here, a defendant is sentenced within the prescribed statutory maximum, no *Apprendi* violation occurs."); *State v. McCoy*, 631 N.W.2d 446, 451 (Minn. Ct. App. 2001) ("*Apprendi* . . . appl[ies] only to situations where a court sentences a defendant to a term that *exceeds* the statutory maximum."); *State v. Freeman*, 267 Neb. 737, 750, 677 N.W.2d 164, 176 (2004) ("The key provision of the holding in *Apprendi* is that the jury must determine any fact that increases the penalty for a crime beyond the prescribed statutory maximum."); *State v. Dilts*, 336 Or. 158, 169, 82 P.3d 593, 599 (2003) ("[T]he crucial difference between the sentence that the defendant in *Apprendi* received and the sentence imposed on defendant is that defendant's sentence did not exceed the prescribed statutory maximum penalty for the offense to which he pleaded guilty . . . .").

Blakely's extension of *Apprendi* established a new rule because it "would not have been an illogical or even a grudging application of [*Apprendi*]" to conclude that it did not extend in the manner later held in *Blakely*. *Butler*, 494 U.S. at 415.

Burton also incorrectly argues that the dissent in *Blakely* recognized the Court did not create a new rule. Petr.'s Br. at 20–21. Until *Blakely*, Justice Breyer believed the Court would not have applied *Apprendi* to determinate sentencing reforms. *Blakely*, 542 U.S. at 346 (Breyer, J., dissenting). And Justice O'Connor stated "there is no map of the uncharted territory blazed by today's unprecedented holding." *Id.* at 320 n.1 (O'Connor, J., dissenting). The dissents repeatedly recognized that *Blakely* imposed a new burden on the state courts. *See, e.g.*, *id.* at 318 (O'Connor, J., dissenting) ("extension of *Apprendi* to the present context will impose significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence"); *id.* ("facts that historically have been taken into account by sentencing judges . . . all must now be charged in an indictment and submitted to a jury"); *Blakely*, 542 U.S. at 319–320 & n.1 (discussing the drastic costs and new burdens imposed on states and the federal government resulting from the Court's extension of *Apprendi*); *id.* at 324 (noting the sentencing guidelines were not before the Court in *Apprendi*); *id.* at 326–27 (Kennedy, J., dissenting) (the Constitution does not require the rule established by the Court in *Blakely*). In light of Justice O'Connor's dissent in *Apprendi* identifying possible interpretations of the *Apprendi* decision, and the

statement that *Blakely* blazed uncharted territory in an unprecedented holding, the dissents in *Blakely* did not concede that *Blakely* was dictated by *Apprendi*. Because reasonable jurists, including the Court's own Justices, did not consider that *Blakely*'s extension of *Apprendi* was dictated by precedent, *Blakely* concerned a "development in the law over which reasonable jurists could disagree." *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994) (quoting *Sawyer v. Smith*, 497 U.S. 227, 234 (1990)). *Blakely* established a new rule.

3. *Blakely* Does Not Fall Within The Narrow Exceptions To The *Teague* Non-Retroactivity Doctrine

When a conviction is final, a new "rule applies only in limited circumstances." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). "New *substantive* rules generally apply retroactively . . . because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 351–52 (citations omitted) (internal quotation marks omitted). "New rules of procedure, on the other hand, generally do not apply retroactively." *Id.* at 352. Procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* "Because of this more speculative connection to innocence, [the Court gives] retroactive effect to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of

the criminal proceeding." *Schriro*, 542 U.S. at 352 (internal quotation marks omitted).

Burton argues that the new rule in *Blakely* should be applied retroactively as a procedural rule rather than a substantive rule. Petr.'s Br. at 31–36. This argument is not well taken because the rule in *Blakely* is not a fundamental rule altering our understanding of bedrock procedural elements, and it does not seriously enhance the likelihood of obtaining an accurate conviction.

To be a watershed rule, a rule must meet two requirements. *Tyler v. Cain*, 533 U.S. at 656, 665 (2001). If the new rule fails to satisfy either requirement, the rule is not a watershed rule and it does not apply retroactively. *Id.* First, the new rule must "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (internal quotation marks omitted) (quoting *Teague*, 489 U.S. at 311). Second, an infringement of the rule must "seriously diminish the likelihood of obtaining an accurate conviction." *Tyler*, 533 U.S. at 665 (quoting *Sawyer*, 497 U.S. at 242). It is not enough that the new rule is "fundamental" in some abstract sense. *Schriro*, 542 U.S. at 352. Rather, the rule must critically enhance the accuracy of the fact finding process. *Id.* "This class of rules is extremely narrow, and it is unlikely that any has yet to emerge." *Id.* at 352 (internal quotation marks omitted) (quoting *Tyler v. Cain*, 533 U.S. at 667 n.7).

First, *Blakely* is not a watershed rule because it is not a fundamental rule altering our understanding of "bedrock procedural elements." In

Washington v. Recuenco, 126 S. Ct. 2546 (2006), the Court held that *Blakely* error was trial error, not structural error. A violation of *Blakely* therefore does not necessarily render a criminal trial fundamentally unfair. *Id.* Although the standard for determining structural error is not coextensive with the standard for determining *Teague's* watershed exception (*see Tyler*, 533 U.S. at 666), the conclusion that *Blakely* error is not structural error demonstrates the rule is not a bedrock procedural element essential to the fairness of the proceeding. *Blakely* is not a watershed rule since a defendant may still receive a fair trial despite the absence of *Blakely's* protections.

The only example of a watershed rule is the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963). A comparison of *Blakely* to *Gideon* demonstrates that *Blakely* is not a watershed rule. *See O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (finding rule was not watershed when compared to *Gideon*). *Gideon* maintains a special status in relation to other constitutional rights. *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 404 (2001). "[T]he 'failure to appoint counsel for an indigent is a unique constitutional defect rising to the level of a jurisdictional defect,' which therefore warrants special treatment among alleged constitutional violations." *Id.* (quoting *Custis v. United States*, 511 U.S. 485, 496, (1994)). A violation of *Gideon's* right to counsel is a structural error, requiring automatic reversal in any case where the right is violated. A violation of *Blakely* is not jurisdictional, and the error does not entitle the defendant to automatic relief. The *Blakely* error may

be harmless, and a federal court must deny habeas relief if the error did not cause actual prejudice. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). The rule announced in *Blakely* does not rise to level of watershed rule such as the right to counsel established in *Gideon*.

In fact, the right to counsel under *Gideon* is so fundamental that an alleged *Gideon* error is the only exception to the rule prohibiting a collateral challenge to expired prior convictions. *Lackawanna County Dist. Attorney*, 532 U.S. at 404; *Daniels v. United States*, 532 U.S. 374 (2001). Unlike *Gideon* error, an error concerning the failure to prove an element or sentencing factor beyond a reasonable doubt is not an exception to the rule announced in *Lackawanna*. The fact that a *Blakely* error, unlike a *Gideon* error, would not allow for consideration of an allegedly unconstitutional expired conviction demonstrates *Blakely* is not the equivalent of *Gideon*.

Second, a violation of the *Blakely* rule does not seriously diminish the accuracy of a defendant's convictions, especially Burton's.[7] "The rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Schriro*, 542 U.S. at 352. A violation of the *Blakely* rule does not necessarily render unreliable the vehicle for determining guilt or innocence. *Recuenco*, 126 S. Ct. at 2551–52 Even though a jury may not have found

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[7] There is no doubt that Burton committed the crimes of rape, robbery and burglary since the jury found him guilty of each crime beyond a reasonable doubt, and the state and federal courts have upheld the validity of his convictions.

the facts underlying the enhanced sentence, the accuracy of the sentence is not seriously diminished. *See Schriro*, 542 U.S. at 356. The rule announced in *Blakely* "has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception." *Saffle v. Parks*, 494 U.S. 494, 495 (1990).

Burton argues that *Blakely* created a fundamental right that critically enhanced the fact finding process because the Court combined the right to a jury trial with the right to have facts proven beyond a reasonable doubt. This combination does not demonstrate that *Blakely* is a watershed rule. In *Schriro*, the Court determined that jury fact finding does not critically enhance the accuracy of the proceeding. *Schriro*, 542 U.S. at 355–58. Burton agrees that a jury finding does not necessarily increase the accuracy of the proceeding. Petr.'s Br. at 33. *Blakely's* recognition of the right to jury fact-finding in a determinate sentencing proceeding is not a watershed rule.

Similarly, the right to a burden of proof of beyond a reasonable doubt does not seriously enhance the accuracy of the proceeding where the issue is not the guilt or innocence of the defendant, but the appropriate punishment for the defendant whose guilt has already been determined. While the use of the beyond a reasonable doubt standard in determining guilt serves the principle that it is better to let a thousand guilty defendants go free than to convict a person who is actually innocent, the burden of proof plays a less important role when guilt has been decided, and the criminal proceeding reaches the sentencing phase. The *Blakely* rule does

not involve whether the defendant is actually guilty or innocent, but the appropriate punishment for a defendant who has already been found guilty of a crime beyond a reasonable doubt.

Burton relies on two pre-*Teague* cases, *Ivan v. City of New York*, 407 U.S. 203 (1972) (per curiam) and *Hankerson v. North Carolina*, 432 U.S. 233 (1977), to argue that the right to a reasonable doubt standard must apply retroactively. Burton argues that because the Court retroactively applied the rule from *In re Winship*, 397 U.S. 358 (1970), in these two cases, the *Blakely* rule must also apply retroactively. These cases have no relevance to the issue before this Court. *Ivan* involved the direct review of a decision of the New York Court of Appeals. *Ivan*, 407 U.S. at 203–04. *Hankerson*, involved the direct review of a decision of the North Carolina Supreme Court. *Hankerson*, 432 U.S. at 239–40. Neither case involved the retroactive application of a new rule in a federal habeas corpus proceeding, and, since *Teague* had not been decided, neither case involved the issue of whether *In re Winship* constituted a watershed rule. If *Ivan* and *Hankerson* had involved a collateral challenge and had been decided post-*Teague*, it is doubtful the Court would have applied the rule retroactively. *See Hankerson*, 432 U.S. at 247 (Powell, J., concurring in judgment) (discussing costs associated with retro-actively applying new rules on collateral review). Contrary to Burton's arguments, *Ivan* and *Hanker-son* do not show that *Blakely* is a watershed rule.

As discussed above, a comparison of *Blakely* with *Gideon* demonstrates *Blakely* does not rise to the level of a watershed rule. A comparison of

Blakely to the Court's prior *Teague* jurisprudence further demonstrates that *Blakely* is not a watershed rule. The relevant frame of reference for retroactivity analysis is not the purpose of the new rule, but the purpose of habeas review. *Sawyer*, 497 U.S. at 239 (citing *Teague*, 489 U.S. at 306). "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Brecht*, 507 U.S. at 633 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). The principle purpose of the writ is not "to inquire whether a criminal convict did in fact commit the deed alleged." *Teague*, 489 U.S. at 312 (quoting *Mackey v. United States*, 401 U.S. 667, 694 (1971)). Rather, the purpose of federal habeas review is "to ensure that state convictions comport with the *federal* law that was established at the time petitioner's conviction became final." *Sawyer*, 497 U.S. at 239. For this reason, the Court has explained that the watershed rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal means." *Teague*, 489 U.S. at 313 (quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting)). Despite Burton's arguments, the Court's prior *Teague* jurisprudence has not identified as a watershed rule the requirement that facts used to enhance a sentence must be proven beyond a reasonable doubt.

Although *Blakely* created the right to have a jury determine, under the beyond a reasonable doubt

standard, the facts used to enhance a sentence in a determinate sentencing system, this does not automatically demonstrate that the absence of this right seriously diminished the accuracy of the sentencing proceeding. Since there is no doubt of the defendant's guilt, and the deprivation of the right may be harmless, Burton does not show that a sentencing proceeding without the protections announced in *Blakely* seriously diminished the accuracy of the proceeding. Because Burton must show the new *Blakely* rule meets *both* requirements of a watershed rule—(1) that it is a fundamental rule altering our understanding of bedrock procedural elements essential to the fairness of the proceeding, and (2) that a violation of the rule seriously diminishes the accuracy of the conviction—and he cannot show either, *Blakely* did not create a watershed rule.

C. Regardless Of Whether *Blakely* Is Retroactive Under *Teague v. Lane*, 28 U.S.C. § 2254(d)(1) Prohibits Granting Relief In This Case

The Court has "long recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law . . . .'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Ex parte Bollman*, 4 Cranch 75, 94 (1807)).[8] The

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[8] Contrary to the arguments of amicus Ratliff, due process does not require the retroactive application of new rules on collateral review. The Due Process Clause does not guarantee a right to collaterally challenge a judgment of conviction. *United States v. MacCollom*, 426 U.S. 317, 323 (1976); *Murray v. Giarratano*, 492 U.S. 1, 8 (1989). Conse-

authority to grant habeas relief to a state prisoner is limited by 28 U.S.C. § 2254, which specifies the conditions under which such relief may be granted. *Felker*, 518 U.S. at 662.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Williams v. Taylor*, 529 U.S. 362, 399 (2000). AEDPA changed the standards governing the "consideration of habeas petitions by imposing new requirements for the granting of relief to state prisoners." *Felker*, 518 U.S. at 662. The statute now prohibits a federal court from granting relief on any claim adjudicated on the merits in state court unless the state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412.

The holding of an opinion is limited to the final result of the case as well as the portions of the opinion necessary to that result. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). Explanatory language in an opinion is dicta if it was not essential to the disposition of the contested issues. *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001). An expression by the Court that

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quently, the Due Process Clause does not guarantee the retroactive application of new rules.

goes beyond the point actually decided is not a holding. *Humphrey's Executor v. United States*, 295 U.S. 602, 626–27 (1935); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399–400 (1821). That a rule may be necessarily implied by a holding is not sufficient to render the rule "clearly established Federal law." *Kane v. Espitia*, 126 S. Ct. 407, 408 (2005). "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

The statute also limits a federal court's review of habeas claim to those holdings in existence "*as of the time of the relevant state-court decision.*" *Williams*, 529 U.S. at 412 (emphasis added). The statute requires the Court "to limit our analysis to the law as it was 'clearly established' by our precedents at the time of the state court's decision." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). The statute requires the Court to look only "for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660–61 (2004) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003)).

Thus, the statute places two clear conditions on the grant of habeas relief to a state prisoner. First, the statute limits relief only to those claims that are based upon a holding of the Court. Second, the statute limits relief only to those claims that are based upon a holding existing at the time of the state court adjudication of the claim. Burton's challenge to his sentence fails to satisfy either of these two conditions. Although Burton seeks relief based upon *Blakely*, the decision did not exist at the time of the

state court adjudication of Burton's claim. Moreover, Burton's particular claim, that the imposition of consecutive standard range sentences is unconstitutional, is not based upon the holding of *Blakely*. The statute therefore bars relief.

1. 28 U.S.C. § 2254(d)(1) Bars Relief Because The Statute Does Not Allow A Court To Grant Relief By Retroactively Applying New Rules

Burton cannot obtain relief because *Blakely* did not exist at the time of the state court adjudication in this case. The statute specifically limits review of habeas claim to those holdings in existence "*as of the time of the relevant state-court decision.*" *Williams*, 529 U.S. at 412 (emphasis added). The statute limits the federal court's analysis to the law in existence at the time of the state court decision. *Wiggins*, 539 U.S. at 520. Unlike *Teague's* non-retroactivity doctrine, the habeas statute simply does not allow for the retroactive application of new rules.[9]

The Court has recognized that, despite some similarities, "the AEDPA and *Teague* inquires are distinct." *Horn v. Banks*, 536 U.S. 266, 272 (2002). The statutory requirement that a claim be based upon "clearly established Federal law" bears only a slight connection to the Court's *Teague* jurisprudence. *Williams*, 529 U.S. at 412. While a Supreme Court opinion that is an old rule under

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[9] The issue of whether 28 U.S.C. § 2254(d)(1) incorporated the *Teague* exceptions to non-retroactivity is also before the Court in *Whorton v. Bockting*, No. 05-595.

Teague will also constitute "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d), the remaining analysis differs significantly from *Teague* when determining retroactivity and the availability of relief. For example, *Teague* considers whether a rule is clearly established from the date the state court judgment becomes final, while the statute determines clearly established federal law from the date of the state court adjudication. The statute also differs from *Teague* in that the statute limits the source of clearly established federal law to the holdings of the Court, while *Teague* allows consideration of lower court opinions. *Williams*, 529 U.S. at 412. Similar to these examples, the statute also differs from *Teague* in that, unlike *Teague*, the statute does not authorize retroactive application of any rule that was not clearly established at the time of the state court adjudication.

A comparison of 28 U.S.C. § 2254(d) with other AEDPA provisions demonstrates the statute does not allow for retroactive application of new rules. Congress expressly authorized the filing of a second or successive petition where the new claim is based upon a "new rule of constitutional law, made retroactive to cases on collateral review, by the Supreme Court . . . ." 28 U.S.C. § 2244(b)(2)(A). Congress used the same language to designate when a district court is authorized to conduct an evidentiary hearing to further develop the factual record. 28 U.S.C. § 2254(e)(2)(A). Congress used similar language to declare when the statute of limitations begins to run for a claim based upon a new rule. 28 U.S.C. § 2244(d)(1)(D). In each of these statutes, Congress used specific language to

expressly allow consideration of new rules made retroactive to collateral review. These three provisions, however, are inapplicable to the standard of review imposed by 28 U.S.C. § 2254(d). *House v. Bell*, 126 S. Ct. 2064, 2078 (2006). Conspicuously absent from 28 U.S.C. § 2254(d) is any language authorizing the courts to grant relief based upon the retroactive application of a new rule. Congress knew how to include language authorizing the use of retroactively applied new rules, but chose not to use such language when enacting 28 U.S.C. § 2254(d). The absence of such language demonstrates the habeas statute does not allow relief based upon the retroactive application of a new rule.

The use of the past tense of the "to be" verb also demonstrates Congress' intent to limit the applicable federal law to that law in existence at the time of the state court adjudication. If Congress wanted to allow relief based upon a conflict between a state court decision and a later announced and retroactively applied rule of federal law, Congress would have authorized the courts to determine whether the state court adjudication "is" at the time of habeas review contrary to or an unreasonable application of federal law. By conditioning relief upon a decision that "was" unreasonable in light of federal law in existence at the time of the state court adjudication, Congress protected the State's interest in finality by eliminating the power of federal courts to retroactively apply a new rule.

The statute bars relief unless the state court adjudication was contrary to or an unreasonable application of clearly established federal law as it existed at the time of the state court

adjudication. *Blakely* was not clearly established federal law because *Blakely* simply did not exist at the time of the state court adjudication of Burton's claim. The statute therefore bars the federal courts from granting relief based upon a retroactive application of *Blakely*.

2. 28 U.S.C. § 2254(d)(1) Bars Relief Because Burton's Sentence Does Not Violate A Holding Of The Court

Even if *Blakely* applies retroactively to cases on collateral review, Burton is not entitled to relief. *Blakely*, as well as *Apprendi*, involved the validity of an individual sentence imposed above the statutory maximum of a single offense. Neither case involved a decision, based upon the defendant's criminal history, to run multiple standard range sentences consecutive to each other. Burton's sentence does not violate clearly established federal law because this Court has never held that consecutive standard range sentences are unconstitutional. Even if *Blakely* applies retroactively, Burton is not entitled to relief under 28 U.S.C. § 2254(d) since his sentence is not unconstitutional under a holding of this Court.

In 2000, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In reaching this holding, *Apprendi* expressly stated the narrow issue before the Court was the validity of an individual sentence on an individual offense. *Id.* at 474. The Court specifically set aside as irrelevant to this narrow

issue the argument that a judge could have imposed consecutive sentences on two other counts to reach the same sentence imposed on the single count. *Id.* "The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." *Id.* The sentences on the other counts were not relevant to the issue before the Court. *Id.* *Apprendi* did not even consider, let alone hold, that judicial imposition of consecutive sentences violates the Constitution.

In *Blakely*, the Court expanded *Apprendi*, holding for the first time that the "statutory maximum" for purposes of an *Apprendi* analysis includes not only the statutory maximum for an offense, but also the top end of a statutorily established standard range for the offense. *Blakely*, 542 U.S. at 303–04. As in *Apprendi*, however, the *Blakely* Court again considered only the validity of an individual sentence imposed for a single offense. *Blakely*, 542 U.S. at 298–99. As in *Apprendi*, the Court noted a sentence on a separate offense was not relevant to the issue before the Court. *Id.* at 299 n.2. As with *Apprendi*, the *Blakely* Court did not consider the issue of a judge running multiple standard range sentences consecutive to each other.

Neither *Apprendi* nor *Blakely* considered the validity of consecutive sentences. Neither *Apprendi* nor *Blakely* held that imposition of consecutive standard range sentences violate the Constitution. The Court's holdings simply did not establish the rule advanced by Burton's claim. Because the rule sought by Burton is not based upon an express holding of the Court, Burton is not entitled to relief.

Even assuming this Court may someday establish the rule asserted by Burton, the rule cannot be announced and applied in this habeas proceeding since *Blakely* itself says nothing about a trial court's authority to impose consecutive sentences. *Kane*, 126 S. Ct. at 408. Moreover, even if the Court were to subsequently hold that *Blakely* applies to consecutive sentences, Burton is not entitled to relief because the state court decision was, at the time, a reasonable application of then existing federal law. The vast majority of courts considering the issue have overwhelmingly concluded that *Apprendi* and *Blakely* do not apply to the imposition of consecutive sentences, at least where the sentences for each individual count does not exceed the statutory maximum for that count.[10] In light of the nearly universal agreement that *Apprendi* and *Blakely* do not apply to consecutive sentencing, the conclusion that Burton's sentence is constitutional cannot be an unreasonable application of clearly established federal law.

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[10] *See, e.g., United States v. White*, 240 F.3d 127, 135 (2d Cir. 2001); *United States v. Hernandez*, 330 F.3d 964, 982 (7th Cir. 2003); *United States v. Harrison*, 340 F.3d 497, 500 (8th Cir. 2003); *United States v. Buckland*, 289 F.3d 558, 570 (9th Cir. 2002) (en banc); *United States v. Chorin*, 322 F.3d 274, 278–79 (3d Cir. 2003); *United States v. Lott*, 310 F.3d 1231, 1242–43 (10th Cir. 2002); *United States v. Davis*, 329 F.3d 1250, 1254 (11th Cir. 2003); *United States v. Lafayette*, 337 F.3d 1043, 1049 n.11 (D.C. Cir. 2003); *State v. Cubias*, 155 Wash. 2d 549, 553–54, 120 P.3d 929 (2005); *People v. Wagener*, 196 Ill. 2d 269, 282–86, 752 N.E.2d 430, 440–42, 256 Ill. Dec. 550, 560–62 (2001); *State v. Higgins*, 149 N.H. 290, 301–03, 821 A.2d 964, 975–76 (2003); *State v. Senske*, 692 N.W.2d 743, 749 (Minn. Ct. App. 2005); *State v. Abdullah*, 184 N.J. 497, 514, 878 A.2d 746, 756–57 (2005).

Finally, even if the Court were to extend *Blakely* to govern consecutive sentencing, the conclusion that Burton's sentence is constitutional would still be a reasonable application of such a rule. "'*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 542 U.S. at 301 (emphasis added) (quoting *Apprendi*, 530 U.S. at 490). The Court has not fully explained the meaning of the phrase "other than the fact of a prior conviction", but it is objectively reasonable for a jurist to determine that the phrase includes a decision to run sentences consecutively in light of the defendant's criminal history.

A jurist could reasonably conclude the judicial imposition of consecutive sentences in order to avoid rewarding Burton for the commission of multiple crimes is based upon the fact of his convictions for those crimes. The jury's role is to determine facts necessary to constitute a statutory offense. *Apprendi*, 530 U.S. at 483. In this case, the jury determined these facts beyond a reasonable doubt, finding that Burton committed the offenses of rape, robbery and burglary. The trial court then made the legal judgment to impose consecutive sentences in order to punish Burton for each one of the crimes the jury had found Burton had committed. In making this legal judgment, the only facts the court considered were the facts of the jury's verdict on the three crimes, and the facts of Burton's prior convictions used in calculating the offender score. J.A. at 26–27, 50–53. The legal judgment that

Burton should be punished for each of his crimes of conviction does not violate *Blakely*.

Apprendi and *Blakely* both concerned cases where an increased punishment resulted from findings of historical facts, other than a fact of conviction, that were the equivalent of elements of an offense. *Apprendi* concerned the determination that the crime of possession of a firearm for an unlawful purpose was actually a hate-crime. *Apprendi*, 530 U.S. at 468. To impose the enhanced sentence in *Apprendi*, the court had to find the defendant committed the crime "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Apprendi*, 530 U.S. at 469 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)). This factual finding was the equivalent of an element of a greater offense since the finding increased the statutory maximum of the crime from 10 to 20 years. *Apprendi*, 530 U.S. at 469. Similarly, *Blakely* concerned the determination that the crime of kidnapping was committed with "deliberate cruelty." *Blakely*, 542 U.S. at 300. This finding was the equivalent of an element since it allowed the trial court to impose a sentence that could not be imposed based solely upon the facts admitted in the defendant's guilty plea. *Id.* at 304.

Unlike *Apprendi* and *Blakely*, Burton was not sentenced to prison for more than the law allowed for his crimes of conviction. As required in *Blakely*, Burton received a standard range sentence for each offense. J.A. at 6, 9. And, unlike *Apprendi* and *Blakely*, other than his prior convictions used to calculate the offender score, the court based Burton's

sentence solely upon the facts contained in the jury's verdict. The trial court determined Burton would be punished only for the rape conviction if the sentences ran concurrent to each other. The court made the legal judgment that Burton should be punished for each crime of conviction, rather than rewarding Burton with free crimes.

The judge made a legal judgment to run the sentences consecutively.[11] The judicial determination that an offender should be punished for each crime of conviction neither alters the maximum penalty for the crime committed, nor creates a separate offense calling for an additional penalty. Nothing in the history of common law "suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481. Nothing in the history of common law, or in the provisions of the Constitution, prohibit a judge from determining that not punishing a defendant for each crime of conviction would be "clearly too lenient."

The Court has not clearly held that a sentence, imposed to ensure that the defendant is punished for each crime he commits, violates the

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[11] It is notable that Burton fails to identify what fact had to be pled and proven to the jury before the court could decide to run his sentences consecutively. Burton fails to identify what fact must be found before a court makes the legal judgment that a punishment is "clearly too lenient." The inability to identify such a fact demonstrates the state court decision was a reasonable application of federal law even if *Blakely* applies retroactively.

Constitution. Consequently, even if *Blakely* applied retroactively and the Court extended the *Blakely* rule to consecutive standard range sentences, the decision to run Burton's sentences consecutively would be a reasonable application of such a rule. Burton is not entitled to relief under 28 U.S.C. § 2254(d).

CONCLUSION

For the reasons stated herein, the Court should affirm the judgment of the Ninth Circuit.

Respectfully Submitted.

Rob McKenna
Attorney General

Paul Douglas Weisser
Senior Counsel

John J. Samson*
Assistant Attorney General
**Counsel of Record*

William Berggren Collins
Carol A. Murphy
Deputy Solicitors General

PO Box 40116
Olympia, WA 98504-0116
360-586-1445

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IN THE
Supreme Court of the United States

LONNIE L. BURTON,
Petitioner,

v.

DOUG WADDINGTON,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Brian Tsuchida
Laura Mate
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT
OF WASHINGTON
1601 Fifth Avenue
Suite 700
Seattle, WA 98101

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Thomas C. Goldstein
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

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REPLY BRIEF FOR PETITIONER

The consistent theme running throughout the State's brief – as well as its *amici*'s – is a persistent refusal to come to grips with this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The State suggests that *Blakely* was not dictated by *Apprendi* because *Apprendi* left the meaning of "statutory maximum" unclear. But the State simply ignores the passages in *Apprendi* that specifically and repeatedly elucidated the "statutory maximum" concept so as to foreordain the result in *Blakely*. Furthermore, the State insists that *Blakely* – even if it did produce a new rule – did not produce a watershed rule because the decision deals only with sentencing offenders "whose guilt already has been determined." Resp. Br. 34. But the State ignores that the fundamental point of *Blakely*, like *Apprendi* before it, is that courts may not sentence defendants for transgressions for which juries have *not* found them guilty. Once the real meanings of *Apprendi* and *Blakely* are taken into account, it is clear that the *Teague* doctrine does not bar Petitioner from seeking relief in this case. And none of the side issues that the State raises prevents this Court from so holding.

I. THE DISTRICT COURT PROPERLY EXERCISED JURISDICTION OVER THIS HABEAS PETITION.

Renewing an argument that the district court rejected, the Ninth Circuit rejected, and this Court did not even consider serious enough to prevent granting certiorari, the State contends that the district court lacked jurisdiction because this habeas petition is "second or successive." Resp. Br. 8-15. This argument has no factual or legal basis.

The State's "second or successive" argument derives from its assertion that Petitioner's two habeas corpus petitions challenged "the same state court judgment." Resp. Br. 9; *see also* Resp. Br. 3-4. But this is simply not true. The first habeas

petition Petitioner filed (in 1998) challenged the state court's original judgment – the "judgment of conviction [entered] Dec. 16, 1994." J.A. 34; *see also* Report and Recommendation, *Burton v. Walter*, No. C98-1844 (W.D. Wash.), Dkt. No. 38 at 1 (filed Feb. 14, 2000) (recognizing that Petitioner was challenging 1994 judgment). Petitioner explained to the district court that the Washington courts, in reviewing that judgment, had "affirmed [his] conviction" and "reversed [his] sentence." J.A. 35. Consequently, his 1998 filing challenged the 1994 judgment with respect to his convictions. J.A. 39-40. The current habeas petition – the one Petitioner filed in 2002 challenging his second resentencing – is indisputably his first and only challenge to the 1998 judgment.

It directly follows that this petition cannot be second or successive. AEDPA incorporates the longstanding understanding of the phrase "second or successive." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). And it has always been the case that petitions challenging new judgments are not second or successive when the claims could not have been brought any sooner. *See, e.g., In re Taylor*, 171 F.3d 185 (4th Cir. 1999) (collecting cases so holding). Even under the most literal understanding of "second or successive," *see Martinez-Villareal*, 523 U.S. at 648-49 (Thomas, J., dissenting), the first petition challenging any given judgment in a timely manner cannot be anything other than a first petition.

Petitioner, who was proceeding *pro se*, obviously filed his 1998 petition challenging the 1994 judgment because he was worried that if "he waited to file his claims challenging his conviction[s], he was at risk of losing the opportunity to present them [after his sentence became final] due to the one-year statute of limitations imposed under AEDPA." J.A. 66. The State reinforced Petitioner's assumption that AEDPA's clock was ticking when he filed that petition, stating that "Burton's judgment on his 1994 convictions became final

when the United States Supreme Court denied the petition for writ of certiorari on April 20, 1998." Respondent's Answer and Memorandum of Authorities, *Burton v. Walter*, No. C98-1844 (W.D. Wash.), Dkt. No. 14 at 18 (filed May 4, 1999) (reprinted at Addendum 21a of this brief). The State, however, now takes exactly the opposite position. It says that Petitioner's concern was unfounded because he could have challenged his convictions and ultimate sentence by means of the 1998 judgment and that that judgment – like any judgment in a criminal case – did not become final for purposes of habeas review until it "became final on the conclusion of direct review." Resp. Br. 14; *see also* 28 U.S.C. § 2244(d)(1)(A) (AEDPA's limitations period does not start running until "the date on which the judgment became final by the conclusion of direct review . . ."). *Amicus* CJLF echoes this argument, asserting that there was never a "[f]inal judgment" until the 1998 judgment became final because "in a criminal case . . . . the sentence is the judgment." CJLF Br. 8-9 (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)).

It is not entirely clear that the State and CJLF are correct.[1] But even if they are, the time for making this

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[1] It is true that for purposes of seeking direct appellate review, this Court has held that criminal cases do not result in "final judgments" until both convictions and sentences have been fully adjudicated. *Flanagan v. United States*, 465 U.S. 259, 263 (1984); *accord Berman*, 302 U.S. at 212. In the context of AEDPA, however, this Court has offered only the ambiguous statement that "[f]inality attaches when this Court affirms *a conviction* on the merits on direct review, or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003) (emphasis added). Furthermore, in assessing when state court adjudications create "final judgments" under 28 U.S.C. § 1257(a) for purposes of this Court's certiorari jurisdiction – a situation arguably more analogous to this one than direct review of a federal case because of the federal-state interplay involved – this Court has held that convictions that have been upheld are "final judgments" even when sentences are still on appeal. *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). And to the extent underlying state law bears on this issue,

argument has long passed. AEDPA allows district courts to entertain a habeas petition from a state prisoner when it attacks "the judgment of a State court." 28 U.S.C. § 2254(a). If indeed there is no "judgment" for purposes of federal habeas review until a prisoner's conviction *and sentence* have become final, then the State could have moved during the federal litigation over Petitioner's 1994 judgment to dismiss the case for lack of jurisdiction. The Washington courts had vacated the 1994 judgment before it became final, so under the State's and CJLF's current view it was not susceptible to attack in federal court.

But this is as far as the State's and CJLF's argument goes. Even if the State could have prevented Petitioner from challenging the 1994 judgment on the ground that he should have had to wait until his 1998 judgment became final, this reality cannot transform the litigation over the 1994 judgment into a prior litigation over Petitioner's 1998 resentencing judgment. The district court in 1998 would not have had the authority to hear (or stay and abey) a challenge to the 1998 judgment because that judgment was not final either. As Petitioner himself told the district court, "THE sentence I received at resentencing [was still] on direct appeal" at that time. J.A. 40 (capitalization in original).

Even setting that predicament aside, this Court has held that a federal court cannot *sua sponte* recharacterize a *pro se*

Washington completes criminal cases with a document called a "judgment and sentence," thus indicating that convictions may constitute their own judgments. *See, e.g.*, J.A. 3, 7. Indeed, the Washington Court of Appeals recently ruled that the limitations period for challenging a "judgment and sentence" in *state* post-conviction review starts as soon as a conviction is affirmed on direct review, even if the sentence is vacated and remanded for resentencing. *In re Pers. Restraint Petition of Skylstad*, No. 24681-7-III (Dec. 15, 2005). The State is currently defending that decision in the Washington Supreme Court. *See* http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2006Sep.

litigant's filing as a first habeas petition "unless it informs the litigant of the consequences of the recharacterization, thereby giving the litigant the opportunity to contest the recharacterization, or to withdraw or amend the motion." *Pliler v. Ford*, 542 U.S. 225, 233 (2004) (describing holding of *Castro v. United States*, 540 U.S. 375, 377 (2003)). Although *Castro* concerned recharacterizing a different kind of filing (a motion under Fed. R. Crim. P. 33) into a habeas petition, the same logic applies here. Serious consequences attach to filing a first habeas petition challenging a particular judgment. Yet neither the district court nor the State ever once suggested to Petitioner that his challenge to the 1994 judgment could or would be treated as a challenge to his 1998 judgment. Had Petitioner been so warned (and assured that a later petition could challenge the convictions and the final sentence), he may well have withdrawn his petition. Accordingly, Petitioner's filing challenging his 1994 judgment could not have been transformed then -- and surely cannot be transformed now -- into one challenging the 1998 judgment.

II. THIS COURT'S DECISION IN *BLAKELY* DID NOT ANNOUNCE A NEW RULE.

The State asserts that *Blakely* announced a new rule because reasonable jurists could have concluded that *Apprendi* did not apply to facts authorizing sentences above the top of a statutory standard sentencing range but below what the State calls a "traditional statutory maximum." Resp. Br. 21-23. In addition, the United States argues that *Blakely* announced a new rule because it declined to craft an exception to *Apprendi* based on two differences between the Washington and New Jersey sentencing laws at issue in the cases. U.S. Br. 14-15. Neither of these arguments withstands scrutiny.

1. No reasonable jurist could have failed to appreciate that *Apprendi*'s "statutory maximum" rule dictated the result in *Blakely*. As the State implicitly acknowledges (Resp. Br. 19),

the "reasonableness" test is an "objective standard." *Stringer v. Black*, 503 U.S. 222, 237 (1992). Accordingly, even though state courts were divided following *Apprendi* over whether that decision applied to sentencing systems like Washington's,[2] "the mere existence of conflicting authority does not necessarily mean a rule is new." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring). The ultimate question remains whether a state court "would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

The State concedes, as it must, that *Apprendi* forbade courts from using facts not proven to a jury beyond a reasonable doubt to increase defendants' sentences beyond the prescribed "statutory maximum." Resp. Br. 15; *see Apprendi*, 530 U.S. at 490. But the State claims that the best reading of *Apprendi* is that it used the phrase "statutory maximum" to describe only a "traditional statutory maximum" – a concept never mentioned in the opinion but supposedly different in kind from a threshold set by a statutory "standard range." *See, e.g.*, Resp. Br. 21. Therefore, the State asserts, reasonable jurists could have believed that applying *Apprendi* to Washington's determinate sentencing system called for an extension of *Apprendi*, not just an application of its already-announced rule.

The State's argument ignores this Court's own words. This Court did more in *Apprendi* than simply say "statutory maximum" and leave for speculation what exactly that term meant. This Court clarified three separate times that a "statutory maximum" is the maximum statutory sentence a given defendant "would receive *if punished according to the facts*

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[2] The State, however, overstates the extent of the conflict. Three of the five decisions the State cites rejecting *Apprendi* challenges to state sentencing laws (*see* Resp. Br. 28 n.6) have nothing to do with the issue at hand. Florida, Louisiana, and Nebraska did not have determinate sentencing systems that were affected by *Blakely*.

reflected in the jury verdict alone." 530 U.S. at 483 (emphasis added); *see also id.* at 483 n.10 (the "statutory maximum" is the statutory "outer limit[]" based on "the facts alleged in the indictment and found by the jury"); *id.* at 482 n.9 ("Nothing in *Williams* [*v. New York*, 337 U.S. 241 (1949)] implies that a judge may impose a more severe sentence than *the maximum authorized by the facts found by the jury.*") (emphasis added).

To the extent that any reasonable jurist could have doubted whether this test covered the top of a statutory standard sentencing range in a guidelines-type system, a further passage in *Apprendi* would have erased it. There, this Court emphasized that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. It is telling, therefore, that not a single one of the pre-*Blakely* state court opinions holding that *Apprendi* did not apply to state determinate sentencing systems (*see* Resp. Br. 28 n.6; U.S. Br. 15 n.7) ever even mentioned this passage from *Apprendi*. Once that passage is taken into account, the result in *Blakely* follows inexorably.[3]

Nothing in Justice O'Connor's dissent in *Apprendi* – upon which the State and United States rely (Resp. Br. 22; U.S. Br. 12-13) – is to the contrary. That dissent suggested that

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[3] Because all that matters in this case is whether *Apprendi* dictated the result in *Blakely*, it is immaterial whether a reasonable federal jurist would have believed that *Apprendi* dictated the result in *United States v. Booker*, 543 U.S. 220 (2005). The federal cases the State and the United States cite upholding the Federal Sentencing Guidelines post-*Apprendi* are thus irrelevant. The same is true of the federal opinions post-*Blakely* that asserted that *Blakely* somehow altered the definition of "statutory maximum." *See* U.S. Br. 12. Those courts were considering whether *Apprendi* and *Blakely* applied to the non-statutory Federal Sentencing Guidelines. To whatever extent some of this Court's language in *Blakely* may have affected that inquiry, it remains that *Apprendi* dictated the *result* in *Blakely* because both cases involved dueling *statutory* sentencing limits. And federal courts recognized as much. *See* Petr. Br. 24 (citing cases).

"under one reading" of this Court's opinion, a sentencing system that "remove[d] from the jury (and subject[ed] to a standard of proof below 'beyond a reasonable doubt') the assessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced" would be constitutional. 530 U.S. at 540 (O'Connor, J., dissenting). Assuming that the "narrower ranges" in such a hypothetical system were statutorily dictated and constrained sentences' upward mobility, the system would be much like the one at issue in *Blakely*. Although Justice O'Connor herself acknowledged that "[i]t is difficult to understand . . . why the Constitution would" draw a line between such a system and the system in *Apprendi*, she asserted that the Court's discussion of the Arizona capital sentencing system suggested the possibility of such a "formalistic" distinction. *Id.* at 541.

But in truth the *Apprendi* Court's discussion of Arizona's capital sentencing system only reinforced that *Apprendi*'s rule was *not* of form, but rather of effect, and that systems like the one at issue in *Blakely* did not pass constitutional muster. While Justice O'Connor asserted that Arizona's system required a finding of fact beyond the jury verdict in order to impose the death penalty, the majority expressly stated that it did not understand the system to work that way. *See* 530 U.S. at 496-97. The majority said that its decision would allow Arizona's system to stand because the system – perfectly consistent with *Apprendi*'s reaffirmance of *Williams*, *see* 530 U.S. at 481-83 & 482 n.9 – required "the jury [to find] the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death." *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)).

The *Apprendi* Court never suggested that any system that worked the way Justice O'Connor described the Arizona system would satisfy its ruling. In fact, once it became clear

the following year that Arizona's system did actually require courts to find an aggravating fact beyond the jury's verdict to impose the death penalty, this Court promptly invalidated the system on the straightforward ground that it exposed defendants to greater punishment than allowed "if punished according to the facts reflected in the jury verdict alone." *See Ring v. Arizona*, 536 U.S. 584 (2002) (quoting *Apprendi*, 530 U.S. at 483). Not a single Justice disputed that *Apprendi* dictated that result.

2. The United States' alternative argument that *Blakely* announced a new rule because it declined to create an exception to *Apprendi* fares no better. The United States contends that a reasonable jurist could have declined to apply *Apprendi* in *Blakely* because (1) the factual finding in *Apprendi* was alone sufficient to impose an enhanced sentence, whereas finding an aggravating fact under Washington's sentencing system authorized a court to impose a heightened sentence if it found "substantial and compelling reasons" to do so; (2) *Apprendi* involved a single aggravating fact that had been specified by the legislature, whereas the list of aggravating facts in the Washington system was illustrative. U.S. Br. 14.

It is true that a hoilding refusing to craft an exception to a prior decision can create a new rule. In *Butler v. McKellar*, 494 U.S. 407, 415 (1990), this Court held that a decision announces a new rule when "[i]t would not have been an illogical or even a grudging application" of an earlier decision to decide that it "did not extend to the facts" of the subsequent case. But when the "differences [in the state systems at issue] could *not* have been considered a basis for denying relief" in light of an earlier decision, then declining to create an exception does not constitute a new rule. *Stringer*, 503 U.S. at 229 (emphasis added). Neither of the differences between New Jersey's hate-crime enhancement system and Washington's exceptional sentence system could reasonably have been considered a basis for declining to find the sentence in *Blakely* unconstitutional.

First, this Court explained in *Apprendi* that the "legally significant" characteristic of the New Jersey law at issue was that it "increased – indeed, it doubled – the maximum range *within which the judge could exercise his discretion*." 530 U.S. at 474 (emphasis added). This Court did not suggest that it might possibly matter whether a standard governed that use of discretion. That is why this Court dismissed in a footnote any possible distinction between the New Jersey and Washington systems, noting that regardless of what type of discretion (if any) a judge has regarding whether to impose an enhanced sentence, the decisive question is whether he can invoke such discretion "without finding some facts to support it beyond the bare elements of the offense." *Blakely*, 542 U.S. 296, 305 n.8.

Second, the illustrative nature of the list of aggravators in Washington's exceptional sentencing system did not provide any reasonable means to distinguish *Apprendi*. As an initial matter, the aggravator in *Blakely* (just like here) was specifically statutorily enumerated, *see* 542 U.S. at 300; J.A. 30-31, so the case was on all fours with *Apprendi*. But even putting that aside, *Apprendi* held that the rights to jury trial and proof beyond a reasonable doubt attached to "*any* fact" that authorized a sentence above the maximum a defendant would receive if punished according to the facts reflected in the jury verdict alone. 530 U.S. at 490 (emphasis added). It consequently was clear from the outset, as *Blakely* later put it, that the illustrative nature of a sentencing system's aggravating factors was "immaterial" to the analysis that *Apprendi* requires. 542 U.S. at 305. Regardless of "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . or *any* aggravating fact . . . , it remains the case that the jury's verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305. Indeed, if anything, the ability of Washington judges to enhance sentences based on unenumerated factors made *Blakely*'s system *worse* than the one in *Apprendi*. The Due Process Clause requires criminal codes to give "fair warning" of conduct that subjects people to

punishment. *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). Enhancing sentences based on unenumerated aggravators flatly contravenes that "basic principle," *id.*, in addition to implicating the jury-trial and beyond-a-reasonable-doubt guarantees.

The only way, in short, for a court that read and absorbed all of *Apprendi* to have refrained from invalidating Washington's system for imposing exceptional sentences would have been to conclude – to borrow Justice Breyer's phrase – that this Court did not really "mean[] what it said" in *Apprendi*. *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting). Perhaps that is what some state courts really thought. But this does not make their refusals to apply *Apprendi* to Washington's system and others like it objectively reasonable. This Court has made clear, as a general matter of judicial decisionmaking, that even when "a precedent of this Court [that] has direct application in a case . . . appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). It follows *a fortiori* that when, as here, this Court has laid down a rule that directly applies to a case, and there are not even any significant crosscurrents in this Court's case law, state courts must follow the letter of this Court's precedent.

Accordingly, this Court should reject the State's invitation to allow state courts to decide with impunity when this Court really means what its opinions say. Such a notion is a recipe for lawlessness. And part of the historical purpose of federal habeas review is to "serve[] as a necessary additional incentive" against state courts' taking such action. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

III. IF *BLAKELY* DID ANNOUNCE A NEW RULE, IT ANNOUNCED A WATERSHED RULE OF CRIMINAL PROCEDURE.

Even if *Blakely* somehow established a new rule, *Blakely* is a "watershed rule[] of criminal procedure." *Teague*, 489 U.S. at 311. Although the State asserts that the *Blakely* rule neither (A) seriously diminishes the likelihood of obtaining an accurate conviction nor (B) alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding, its arguments do not hold weight.[4]

A. A Violation of the *Blakely* Rule Seriously Diminishes the Likelihood of Obtaining an Accurate Conviction.

This Court held in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), and *Hankerson v. North Carolina*, 432 U.S. 233 (1977), that failing to use the reasonable doubt standard with respect to even a single element "substantially impairs [the trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Ivan V.*, 407 U.S. at 204 (per curiam) (all elements); *accord Hankerson*, 432 U.S. at 242 (one element). The State nevertheless contends that these cases do not control the accuracy-diminishing inquiry here because (1) they were cases on direct review decided prior to *Teague* establishing the test for identifying watershed rules and (2) the issue here "is not the guilt or innocence of the defendant, but the appropriate

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[4] The State also asserts that AEDPA does not allow federal courts to apply new watershed rules retroactively. Resp. Br. 40-43. But this argument lies outside the questions presented, which are limited to whether *Teague* bars relief here. *See* Petr. Br. i. In any event, the Brief for Hon. Edward N. Cahn et al. as *Amici Curiae* Supporting Respondent in Whorton v. Bockting, No. 05-595, in which the question is actually presented, explains why the State is incorrect.

punishment for the defendant whose guilt has already been determined." Resp. Br. 34-35. Neither argument has merit.

1. Despite the fact that *Ivan V.* and *Hankerson* arose in different circumstances from this case, the accuracy-diminishing standard the Court applied in those cases is the same as the one it later established in *Teague*. Under *Teague*, just like under this Court's earlier retroactivity test utilized in *Ivan V.* and *Hankerson*, the test is whether infringement of the rule "seriously diminish[es] the likelihood of obtaining an accurate conviction." *Tyler v. Cain*, 533 U.S. 656, 665 (2001). And contrary to the United States' suggestion (Br. 29-30), nothing in this Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), suggests the contrary. *Schriro* simply quoted *Teague* itself and its explanation that violating the accuracy-diminishing inquiry creates an "'impermissibly large risk' of punishing conduct the law does not reach." *Schriro*, 542 U.S. at 356 (quoting *Teague*, 489 U.S. at 312-13). That explanation is simply another way of saying that a criminal trial's "truth-finding function" has been unduly impaired. *Ivan V.*, 407 U.S. at 204.

2. The State's insistence that the factfinding here does not pertain to guilt/innocence evinces nothing more than a continuing refusal to come to grips with the holdings of *Blakely* and *Apprendi*. The core holding of those decisions is that any fact – even if labeled an enhancement or aggravating fact – that subjects a defendant to heightened punishment is an element of the offense for which the defendant has been convicted. *See, e.g.*, *Blakely*, 542 U.S. at 306; *Apprendi*, 530 U.S. at 495. When, therefore, a court finds such a fact by a preponderance during a sentencing proceeding, it effectively finds the defendant guilty of a new and greater crime without affording the defendant the customary procedural protections that apply to elements of crimes. *See* Petr. Br. 30-31. Accordingly, the accuracy-diminishing analysis in *Ivan V.* and *Hankerson* applies with full force in the context of a *Blakely* violation.

The fact that *Blakely* involves the standard of proof that courts must apply before finding a defendant guilty of a given offense distinguishes it from all of the other circumstances the United States cites (*see* U.S. Br. 25-27) in which this Court has condoned using the preponderance standard to find certain facts. In all of those circumstances, the findings at issue involve collateral matters or are used to calibrate punishment within a range already authorized by findings a jury has made beyond a reasonable doubt. *Blakely*, however, involves the facts that establish that range in the first place. It therefore resides at the core of the criminal justice system's truth-seeking function.

B. *Blakely* Implicates Our Understanding of the Bedrock Procedural Elements Essential to the Fairness of a Proceeding.

The State and the United States contend that *Blakely* does not have the sweep or primacy necessary to constitute a bedrock rule because (1) *Blakely* applies only in a select group of states with determinate sentencing systems; (2) *Blakely* made only an "incremental" change in the law that does not rise to the level of establishing a prerequisite for fundamental fairness. Neither of these arguments withstands scrutiny.

1. It makes no sense to assert, as the United States does (Br. 20), that *Blakely* does not apply in enough jurisdictions to constitute a bedrock rule. *Blakely,* like any federal constitutional decision, establishes a baseline principle that applies in *every* jurisdiction: any fact, except a prior conviction, that exposes a defendant to punishment above an otherwise binding statutory maximum must be proved to a jury beyond a reasonable doubt.

Even if the number of states forced to change their laws in immediate reaction to a ruling were relevant, *Blakely* would easily qualify as a bedrock rule. Prior to this Court's decision

in *Gideon v. Wainwright*, 372 U.S. 335 (1963), only five states failed to provide counsel for indigent defendants in non-capital criminal cases. William M. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150, 1156 (1963). Yet all agree that *Gideon* established a bedrock rule. Though some sorting is still taking place, *Blakely* already has required nine states to reconfigure their determinate sentencing schemes.[5]

2. It likewise is immaterial whether *Blakely* (assuming it announced a new rule) effectuated an "incremental" change in the law, or something more. Nothing in *Teague*'s test for being a bedrock rule requires a decision to mark a dramatic change from prior law. All that is required is that a decision "implicat[e]" the fundamental fairness of proceedings. *Schriro*, 542 U.S. at 355 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)). That is why *Gideon* established a bedrock rule, even though before the decision defendants charged with felonies in federal court already enjoyed a right to counsel, as did all defendants charged with capital offenses. *See Johnson v. Zerbst*, 304 U.S. 458 (1938) (all federal cases); *Powell v. Alabama*, 287 U.S. 45 (1932) (capital cases). In the recent words of the Eleventh Circuit: "[I]t is the sheer importance of the right [involved] that is primary to the analysis, not the incremental extension of that right in the case at hand." *Howard v. United States*, 374 F.3d 1068, 1080-81 (11th Cir. 2004).

Even if the degree of refinement a decision effectuates were relevant to the bedrock calculus, a comparison to right-to-counsel cases again would show why *Blakely* is a bedrock rule. This Court held prior to *Teague*, and lower courts have

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[5] *See* Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* Supporting Petitioner at 7-8, *Cunningham v. California*, No. 05-6551 (U.S. May 8, 2006); Nancy J. King & Susan R. Klein, *Beyond* Blakely, 51-DEC Fed. Law. 53, 53 (2004) (noting that *Blakely* "threatens" the sentencing system in 14 states).

consistently held since, that each time the scope of *Gideon* has been clarified, those decisions have applied retroactively. *See Howard,* 374 F.3d at 1077-81 (collecting cases and holding that clarification of right to counsel in *Alabama v. Shelton*, 535 U.S. 654 (2002), is a bedrock rule). These decisions make perfect sense: if, for example, states had been free following *Gideon* to define for themselves what crimes constituted "felonies" and to restrict the right to counsel to the trial phase of such prosecutions, the right to counsel would not have been worth very much. Accordingly, decisions clarifying the scope of the right to counsel have been just as important as recognizing the right itself.

So too with the rights to trial by jury and proof beyond a reasonable doubt. It is true that decisions such as *Duncan v. Louisiana,* 391 U.S. 145 (1968), and *In re Winship*, 397 U.S. 358 (1970), first recognized that these rights applied in state criminal trials. But without *Apprendi*'s and *Blakely*'s prohibitions against "circumvent[ing] [those protections] merely by 'redefin[ing] the elements that constitute different crimes,'" *Apprendi*, 530 U.S. at 485 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)), those rights would not have much genuine force. A state, for example, could set up a system under which a judge "could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene." *Blakely*, 542 U.S. at 306. Indeed, "when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction" between convictions for a greater and a lesser crime "may be of greater importance than the difference between guilt or innocence for many [minor] crimes." *Mullaney*, 421 U.S. at 698.

Contrary to the State's assertion (Resp. Br. 32), there is no tension between this conclusion and this Court's recent holding that at least some *Blakely* errors can be deemed

harmless. *See Washington v. Recuenco*, 126 S. Ct. 2546, 2551-53 (2006). As was relevant in *Recuenco*, constitutional errors require automatic reversal only when they "*necessarily* render[] a criminal trial fundamentally unfair." *Id.* at 2551 (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)) (emphasis added). There are surely some instances – such as when the defendant had fair notice of an alleged basis for an enhancement and failed to dispute the prosecution's overwhelming evidence – when a reviewing court can confidently say that failing to put the factual issue to the jury did not result in a fundamentally unfair trial.[6] But that reality does not undermine the conclusion that submitting to juries for proof beyond a reasonable doubt factual issues that expose defendants to heightened punishment is a bedrock requirement for criminal trials in general.

Any other analysis would lead to simply unacceptable results. This Court, for instance, has held that the rule prohibiting the government from knowingly using false evidence to obtain a conviction is subject to harmless error. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). Yet it could hardly be gainsaid that this rule is "[o]ne of the bedrock principles of our democracy, 'implicit in any concept of ordered liberty,'" and that "[d]eliberate deception of a judge and jury is 'inconsistent with the rudimentary demands of

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[6] In *Recuenco*, the error at issue was not a "full" *Blakely* error because the State alleged the sentence enhancement in the charging instrument and the issue was actually litigated at trial. *See* 126 S. Ct. at 2549. Consequently, this Court did not directly address whether a *Blakely* violation, like the one here, in which the defendant had no notice "from the face of the felony indictment" that he faced the possibility of enhanced punishment, *Apprendi*, 530 U.S. at 478, could be deemed harmless. *See Recuenco*, 126 S. Ct. at 2552 n.3; *id.* at 2554 (Stevens, J., dissenting); Transcript of Oral Argument at 54-56, *Washington v. Recuenco*, No. 05-83 (U.S. Apr. 17, 2006) (State explicitly distinguishing between these two types of errors and recognizing that failing to put defendant on notice that he was facing an aggravated crime "could have any number of implications" not present in *Recuenco*).

justice.'" *Hayes v. Woodford*, 301 F.3d 1054, 1088-89 (9th Cir. 2002) (Thomas, J., concurring in part and dissenting in part) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959) and *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Similarly, the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), prohibiting the government from suppressing evidence favorable to the accused, requires reversal only when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (quotation omitted). Yet it would be difficult to argue that *Brady* is not a bedrock rule essential to the fairness of criminal trials.

The point is that the tests for structural errors and bedrock rules serve different goals. Even if violating a rule results in an error that can be segregated from the rest of the trial and is sufficiently quantifiable that it is susceptible to harmless error review (on direct review or on habeas), that does not necessarily mean that the rule itself is not a bedrock rule essential to the fairness of criminal trials. *Blakely* is a bedrock rule.

IV. IF THIS COURT HOLDS THAT *BLAKELY* APPLIES RETROACTIVELY, IT SHOULD REMAND THE CASE FOR FURTHER PROCEEDINGS.

The State finally argues that even if this Court holds that *Blakely* applies retroactively under *Teague*, it should still affirm the Ninth Circuit's judgment because the state trial court's imposition of consecutive sentences did not actually violate *Blakely*. Resp. Br. 43-49. The Ninth Circuit, however, never considered this argument, and it lies beyond the questions presented. Accordingly, it suffices to say that there is no reason for this Court to depart from its customary course of remanding cases for courts of appeals to consider unresolved

issues in the first instance. *See, e.g.*, *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (per curiam).

This course is especially advisable here because the State has neglected to provide critical information respecting its argument. The State maintains that the imposition of Petitioner's consecutive sentences was constitutional because courts have "overwhelmingly" and correctly "concluded that *Apprendi* and *Blakely* do not apply to the imposition of consecutive sentences, at least where the sentences for each individual count does [sic] not exceed the statutory maximum." Resp. Br. 45 & n. 10. But most of the cases the State cites are pre-*Booker* federal cases applying the Federal Sentencing Guidelines, and thus have no relevance here. And none of the state cases the State cites involved systems in which a trial court needed to find an aggravating fact beyond the jury's verdict to impose sentences consecutively instead of concurrently. In Washington, by contrast, imposing consecutive sentences for the crimes at issue here constitutes an "exceptional sentence," and thus the trial court here could do so only upon finding an "aggravating fact" under exactly the same procedures as were at issue in *Blakely* itself. *See* Petr. Br. 3-4.[7] In the only other state with a comparable system under which "judicial fact-finding must occur before consecutive sentences may be imposed," the state supreme court had little difficulty concluding that the system "violate[d] principles announced in *Blakely*." *State v. Foster*, 845 N.E.2d 470, 491 (Ohio 2006).

To the extent the State asserts that Petitioner's exceptional sentence does not violate *Blakely* because the

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[7] The Washington case the State cites, *State v. Cubias*, 120 P.3d 929 (Wash. 2005), involved consecutive sentences that were imposed under a different part of the state sentencing system. Unlike the "exceptional sentence" procedures at issue here and in *Blakely*, the procedures at issue in *Cubias* did not require the trial court to find an "aggravating fact" before imposing consecutive sentences.

particular aggravator that supports the sentence – namely, that in light of Petitioner's multiple offenses, it would be "clearly too lenient" to give concurrent sentences – is a "legal judgment" that is exempt from *Blakely*, *see* Resp. Br. 48, the State simply misrepresents state law. As the State must be aware, the Washington Supreme Court expressly has held that the Sentencing Reform Act's "clearly too lenient" aggravator requires a "factual determination," not simply a legal judgment, "that *cannot* be made by a trial court following *Blakely*." *State v. Hughes*, 110 P.3d 192, 203 (Wash. 2005). Specifically, the "clearly too lenient" aggravator requires a finding that there was "some extraordinarily serious harm or culpability resulting from [the] multiple offenses." *Id.* at 202 (quotation omitted). That construction of state law is binding on this Court. *See, e.g.*, *Mullaney*, 421 U.S. at 690-91. And these are exactly the kind of factual determinations that fall within the rule of *Apprendi* and *Blakely* and far outside the "prior conviction" exception in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See, e.g., Apprendi*, 530 U.S. at 492-93 (defendant's *mens rea*); *Jones v. United States*, 526 U.S. 227, 236 (1999) (harm-related aggravator).

CONCLUSION

For the forgoing reasons, as well as those stated in Petitioner's opening brief, this Court should reverse the decision of the Court of Appeals and remand the case for further proceedings.

Respectfully submitted,

Brian Tsuchida
Laura Mate
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT
OF WASHINGTON
1601 Fifth Avenue
Suite 700
Seattle, WA 98101

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Thomas C. Goldstein
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

October 2006

THE HONORABLE DAVID E. WILSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

LONNIE L. BURTON, Petitioner, v. KAY WALTER, Respondent.	No. C98-1844L (Consolidated with C98-1846L) RESPONDENT'S ANSWER AND MEMORANDUM OF AUTHORITIES (Filed May 4, 1999)

The Respondent, by and through her attorneys, CHRISTINE O. GREGOIRE, Attorney General, and JOHN J. SAMSON, Assistant Attorney General, answers Burton's consolidated habeas corpus petitions.

I. BASIS OF CUSTODY

Burton is in custody at the Airway Heights Correction Center pursuant to his 1992 convictions for rape of a child in the second degree, child molestation in the second degree and sexual molestation of a child. Exhibit 1, Judgment and Sentence, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 2, Order Amending Judgment and Sentence to Reflect Correct Offender Scores, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 3, Statement of Defendant on Plea of Guilty, *State v. Burton,* King County Cause No. 92-1-02798-1. Burton is also in custody for his 1994 convictions for first degree rape, first degree robbery and first degree burglary. Exhibit 4, Judgment and Sentence, *State v. Burton,* King County Cause No. 93-1-06948-7.

II. STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS.

1. Facts Related To King County Cause No. 92-1-02798-1.

The Washington Court of Appeals summarized the facts of Burton's 1992 convictions as follows:

> In October 1992, Lonnie Burton pleaded guilty to second degree rape of a child (count I), second degree child molestation (count II), and sexual exploitation of a minor (count IV). Under the terms of the plea agreement, the State dropped 5 additional charges and recommended standard-range sentences for all 3 counts, including 90 months for count II.
>
> On November 20, 1992, the court imposed the following concurrent standard-range sentences: 89 months (count I), 102 months (count II), and 102 months (count IV). The sentences on counts I and IV were at the top end of the standard range; the sentence on count II was at the mid-point. Burton's offender scores were based in part on a prior conviction in Snohomish County for third degree child rape.
>
> Burton's sentence was affirmed on appeal. *State v. Burton,* No. 31847-1-I (June 20, 1994). He then moved to withdraw his guilty plea, arguing that it was not voluntary. On May 8, 1995, the trial court denied that motion.
>
> On April 25, 1995, Burton's Snohomish County conviction for third degree child rape was reversed and remanded for a new trial. *State v. Burton,* No. 31432-7-I. On September 7, 1995, Burton moved for resentencing, arguing that the judgment and sentence should be amended to reflect the lower offender scores resulting from the reversal of his Snohomish County conviction. Based on the recalculated offender

scores, the standard ranges for Counts I and IV were reduced. The standard range for Count II remained the same (87-116 months) because the offender score was reduced from 12 to 9. Counsel for Burton asked the court to impose lower sentences on counts I and IV, but the same sentence on count II (102 months).

In a written resentencing recommendation filed on January 2, 1996, the State noted that it was bound by the plea agreement and recommended lower sentences on counts I and IV to reflect the recalculated standard ranges. The State's recommendation for count II remained the same (90 months).

The State also alerted the court to what it termed a "potential fraud." Defense counsel had submitted a supplemental sentencing memorandum asserting that Burton's 2 Indiana theft convictions had been reduced to misdemeanors, a fact that would have lowered the offender scores even more. Defense counsel's memorandum was apparently based on Burton's declaration and 2 attached exhibits purporting to show that Burton's motion to reduce the Indiana convictions to misdemeanors had been granted. The deputy prosecutor submitted evidence that Burton's motion had in fact been denied and that the exhibits purporting to show otherwise had been altered. Two days later, defense counsel withdrew as Burton's attorney, informing the court that he now believed Burton's Indiana convictions had not been reduced.

Resentencing occurred on May 8, 1996. Burton, who was represented by new counsel, participated in the hearing by telephone. At the beginning of the hearing, the deputy prosecutor summarized the case at the court's request, stating that "we've prepared a modified Judgment and Sentence to reflect the newer, lower standard ranges, and it's my understanding that the total term of confinement of 102 months

remains in effect." The trial court responded that the prosecutor's understanding was correct as to count II, "as the midpoint of what remains the standard range of 87 to 116." The court then stated that "it does remain the court's intention to reimpose the same sentence as previously on that count."

At this point, Burton asked the deputy prosecutor what his recommendation was, and the deputy prosecutor replied, "[m]y recommendation is 102." Burton then moved to withdraw his guilty plea, arguing that the State had violated the terms of the plea agreement by changing its recommendation from 90 months to 102 months. The trial court denied the motion, noting that it was simply retaining the previously imposed sentence and that the court's decision bore no relation to the State's "recommendation." The court also indicated, in an apparent reference to the incident involving Burton's Indiana convictions, that the circumstances occurring after the guilty plea might serve to release the State from its obligations under the plea agreement.

The deputy prosecutor explained that the proposed order had been worked out with Burton's prior attorney and that his comment in response to Burton's question merely reflected his awareness that the court intended to impose a sentence of 102 months on count II.

Exhibit 5, Unpublished Opinion, *State v. Burton,* Court of Appeals Cause No. 38810-0-I, at 2-4.

2. Facts Related To King County Cause No. 93-1-06948-7.

The Washington Court of Appeals summarized the facts of Burton's 1994 convictions as follows:

On October 18, 1991, 15-year-old M.C. was raped at gunpoint by a stranger he later identified as Lonnie Burton. According to M.C.'s testimony, the episode began when, shortly after he arrived home from school, there was a knock at his door. Answering the door, he found Burton offering hockey tickets for sale. M.C. declined to purchase any. Burton asked whether he could use the telephone. When M.C. refused, Burton presented a gun and forced his way into the home. Burton told M.C. to go upstairs, asked M.C. not to look at him, and followed M.C. upstairs. He ordered M.C. to go into his bedroom. Burton then orally and anally raped M.C. After ejaculating, Burton showed M.C. the clock and told him he would shoot him if he moved within 15 minutes. Burton then left M.C.'s bedroom and removed $160 from M.C.'s parents' dresser.

When M.C.'s father came home, M.C. was not yet certain whether his assailant had left the house. M.C. told his father that he was raped. After his father checked through the house for the intruder, they called the police.

The police came and gathered evidence. They gathered hair samples and fingerprints, and took M.C.'s bedspread and clothing. The police canvassed the neighborhood in search of witnesses. M.C. was taken to the hospital, where a rectal swab was taken. Due to a lack of leads, the case was inactivated less than a month later.

Meanwhile Burton went to Indiana and, for reasons unrelated to this case, was detained in an Indiana jail. There he befriended another inmate, James Martin, and shared with Martin information about a rape Burton was charged with in Snohomish County, involving a victim named J.L. [footnote omitted] Also, Burton shared information regarding the M.C. rape.

After Burton shared this information he and Martin had a falling out. Fewer than five months after the M.C. rape, Martin wrote a letter to Mark Roe, a deputy prosecutor in Snohomish County responsible for the Snohomish County case against Burton. Martin wrote that Burton had told him about the Snohomish County case and furnished details. Martin also furnished details about a rape Prosecutor Roe was later able to identify as the M.C. rape.

The physical evidence was inconclusive. Fingerprints lifted from the screen door and from a card in the dresser drawer matched neither Burton nor any member of M.C.'s family. Pubic hairs found were similar only to M.C., and head hairs found were significantly different than Burton's. M.C.'s identification of Burton was not entirely positive; he chose Burton from a line-up of six as the one who most looked like his assailant, but he chose a different person in the line-up as the one who most sounded like the assailant.

A neighbor, Colleen Barnes, testified that she saw someone running from the direction of the M.C. house the day of the rape. She said he entered a car parked across the street from her home and then sped away. She further testified that the car she saw that day strongly resembled one Burton had borrowed from a friend during the week of the incident. Barnes also chose Burton out of a photo montage as the person who most closely resembled the person she saw that day.

Also testifying was Manuel Parejo, who was in the Snohomish County jail with Burton in September 1992. According to Parejo, Burton acknowledged telling Martin too much information about a crime. Parejo too, like Martin, was able to recite details of the M.C. rape.

> Burton testified. He denied that he raped M.C., and explained that he was with Cory Howerton and Mike Pepion after school on the day of the rape. He testified that he picked up Howerton from school, they went to Howerton's home, then to Pepion's home, and then to football games in West Seattle and Edmonds. Howerton and Pepion each testified to being at a soccer game with Burton on the day of the rape.

Exhibit 6, Unpublished Opinion, *State v. Burton,* Court of Appeals Cause No. 35747-6-I, at 1-4.

B. STATEMENT OF PROCEDURAL HISTORY.

1. Procedural History Related To King County Cause No. 92-1-02798-1 (Challenged Under Cause No. C98-1844L).

Following Burton's guilty plea, the State recommended a sentence of 90 months in accordance with the plea agreement. Exhibit 7, Plea Agreement, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 8, State's Sentence Recommendation, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 9, Verbatim Report of Proceedings (November 20, 1992 and May 8, 1996), *State v. Burton,* King County Cause No. 92-1-02798-1, at 4-5. The court sentenced Burton to concurrent standard range sentences of 89 months for count I, 102 months for count II, and 102 months for count IV, for a total sentence of 102 months. Exhibit 1, at 2-3.[1]

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[1] The superior court denied Burton's motion to withdraw his guilty plea. Exhibit 14, Motion to Withdraw Guilty Plea, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 15, Brief in Support of Motion to Withdraw Guilty Plea, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 16, Defendant's Motion to Withdraw Guilty Plea and

(Continued on following page)

The Washington Court of Appeals affirmed the sentence, and the Washington Supreme Court denied review. Exhibit 10, Unpublished Opinion, *State v. Burton,* Court of Appeals Cause No. 31847-1-I; Exhibit 11, Petition for Review, *State v. Burton,* Supreme Court Cause No. 62026-1; Exhibit 12, Ruling Denying Motion for Discretionary Review, *State v. Burton,* Supreme Court Cause No. 62026-1. The mandate issued on December 7, 1994. Exhibit 13, Mandate, *State v. Burton,* Court of Appeals Cause No. 31847-1-I.

In September 1995, Burton moved to amend his judgment and sentence following the reversal of a prior conviction used in calculating the offender score. Exhibit 19, Motion to Resentence Defendant and Amend Judgment and Sentence, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 20, Declaration of David Trieweiler, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 21, Declaration of Lonnie Burton in Support of Trial and Motion for Resentencing, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 22, Supplemental Memorandum in Support of Motion to Resentence Defendant and Amend Judgment and Sentence, *State v. Burton,* King County Cause No. 92-1-02798-1. The State submitted a written recommendation in response to Burton's motion:

> The State is bound by its plea agreement with the defendant and therefore recommends

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Memorandum in Support Thereof, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 17, Declaration of Lonnie Burton, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 18, Findings of Fact and Conclusions of Law on Defendant's Motion to Withdraw His Guilty Plea, *State v. Burton,* King County Cause No. 92-1-02798-1.

> that the court sentence the defendant to the following concurrent terms on resentencing:
>
> On count I, 61 months
> On count II, 90 months
> On count IV, 75 months
>
> The total recommended time would be 90 months. All other conditions of the previous Judgment and Sentence should be reimposed.

Exhibit 23, State's Recommendation on Resentencing, *State v. Burton,* 92-1-02798-1, at 2.[2]

The superior court conducted a hearing on May 8, 1996. Exhibit 9, at 25-35. The prosecutor presented an order modifying the judgment and sentence to reflect the correct offender scores. Exhibit 9, at 26; Exhibit 2. When Burton asked the prosecutor for his recommendation, the prosecutor responded, "My recommendation is 102." Exhibit 9, at 27. The prosecutor later clarified he was not changing the State's original sentencing recommendation. Exhibit 9, at 34.

Judge Downing indicated he would amend the sentences on counts I and IV to reflect the new standard ranges, but it was his intent to reimpose the same sentence on count II because the standard range had not

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[2] The State also informed the court that documents concerning Burton's Indiana conviction had been altered. Exhibit 23, at 2-3. Burton's attorney then filed a supplemental declaration and moved to withdraw as counsel. Exhibit 24, Supplemental Declaration of David A. Trieweiler Re Defendant's Motion to Amend Judgment and Sentence, *State v. Burton,* King County Cause No. 92-1-02798-1; Exhibit 25, Notice of Withdrawal and Substitution of Counsel, *State v. Burton*, King County Cause No. 92-1-02798-1.

changed. Exhibit 9, at 27-28. Judge Downing then amended Burton's judgment and sentence to reflect the correct offender scores. Exhibit 9, at 32; Exhibit 2. Judge Downing again sentenced Burton to a standard range sentence of 102 months for count II. Exhibit 2. Judge Downing adjusted the sentences on counts I and IV to reflect the corrected standard ranges on those counts, but Burton's total sentence remained at 102 months because the sentences were concurrent. Exhibit 2.

Burton appealed to the Washington Court of Appeals. Exhibit 26, Brief of Appellant, *State v. Burton,* Court of Appeals Cause No. 38810-0-I; Exhibit 27, Reply Brief of Appellant, *State v. Burton,* Court of Appeals Cause No. 38810-0-I. Burton also filed a personal restraint petition challenging the amended sentence. Exhibit 28, Personal Restraint Petition, *In re Burton,* Court of Appeals Cause No. 39120-8-I; Exhibit 29, Petitioner's Reply Brief, *In re Burton,* Court of Appeals Cause No. 39120-8-I. The court consolidated the petition with the direct appeal under cause number 38810-0-I. Exhibit 30, Order of Consolidation, *State v. Burton,* Court of Appeals Cause No. 38810-0-I (consolidated with cause number 39120-8-I). The court affirmed the judgment and sentence and denied the personal restraint petition. Exhibit 5.

Burton then sought discretionary review by the Washington Supreme Court, raising the following issues:

> 1. At resentencing, the State violated the terms of the plea agreement when the prosecutor:
>
> (a) Recommended a sentence of 102 months rather than the agreed-upon 90 months;

(b) Worked out a proposed order with Burton's prior attorney for a 102-month sentence, thus violating the 90-month promise in the plea agreement; and

(c) Made no recommendation at resentencing at all until asked to do so by Burton, and then equivocated on the promised recommendation.

2. The trial court erred in denying Burton's motion to withdraw his guilty pleas under these circumstances.

3. The Court of Appeals erred in finding:

(a) That "Burton's arguments might be more persuasive if the prosecutor's remarks had occurred during the original sentencing hearing."

(b) "[T]he [resentencing] hearing was not a substantive sentencing hearing at which the State was obligated to present a formal recommendation in accordance with the plea agreement."

(c) That when a prosecutor, as in this case, fails to adhere to the terms of a plea agreement, it is not a "manifest injustice" that would allow a defendant the right to withdraw his plea.

(d) That the deputy prosecutor's 102-month sentence recommendation did not constitute a breach of the State's obligation under the terms of the plea agreement.

Exhibit 31, Petition for Review, *State v. Burton,* Supreme Court Cause No. 65736-0, at 1-2.

The Supreme Court denied review on December 3, 1997. Exhibit 32, Order, *State v. Burton,* Supreme Court Cause No. 65736-0; *State v. Burton,* 133 Wn.2d 1027, 950 P.2d 475 (1997). The court of appeals issued its mandate on January 16, 1998. Exhibit 33, Mandate, *State v. Burton,* Court of Appeals Cause No. 38810-0-I.

2. Procedural History Related To King County Cause No. 93-1-06948-7 (Challenged Under Cause No. C98-1844L).

Burton appealed his 1994 convictions to the Washington Court of Appeals. Exhibit 34, Brief of Appellant, *State v. Burton,* Court of Appeals Cause No. 35747-6-I; Exhibit 35, Reply Brief of Appellant, *State v. Burton,* Court of Appeals Cause No. 35747-6-I; Exhibit 36, Pro Se Supplemental Brief, *State v. Burton,* Court of Appeals Cause No. 35747-6-I.[3] The court affirmed the convictions, but remanded for resentencing. Exhibit 6.

Burton sought discretionary review by the Washington Supreme Court. Exhibit 40, Petition for Review, *State v. Burton,* Supreme Court Cause No. 65706-8. Burton raised the following issues:

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[3] Burton also filed two personal restraint petitions which were later consolidated with Burton's direct appeal under cause number 35747-6-I. *See* Exhibit 37, Order of Consolidation, *In re Burton,* Court of Appeals Cause No. 38217-9-I; Exhibit 38, Order of Consolidation, *In re Burton,* Court of Appeals Cause No. 39119-4-I; Exhibit 39, Petitioner/Appellant's Reply Brief, *In re Burton,* Court of Appeals Cause No. 39119-4-I. The state court file received by Respondent do [sic] not contain a copy of the petitions, and Respondent is attempting to obtain a copy of the petitions.

1. Where a prosecutor violated an in limine ruling and injected highly prejudicial evidence that Burton was previously convicted of a crime involving another young male victim, did the resulting prejudice deny Burton a fair trial, particularly where Burton's prior conviction was void and reversed due to nearly identical unconstitutional prosecutorial misconduct by the same prosecutor?

2. Did the prosecutor's cross-examination of Burton by unproved innuendo constitute prejudicial misconduct which denied Burton a fair trial?

3. Where details from a hearsay statement to a medical technician are not necessary for treatment of diagnosis, does the statement fall outside the hearsay exception?

4. Where a state's witness's motive to fabricate arose before he wrote a letter, did the trial court err in admitting the letter as a prior consistent statement?

5. Did the trial court's exclusion of numerous defense exhibits, coupled with the court's refusal to authorize Burton to call a witness from Indiana to impeach the state's key witness's testimony, deny Burton his constitutional right to compulsory process and to present material evidence in his defense?

6. Did cumulative error deny Burton his right to a fair trial?

Exhibit 40, at 1-2.

Burton presented issues 1 and 6 as federal constitutional violations, but he presented issues 2, 3 and 4 as

mere errors of state law. Exhibit 40, at 11-20. Although he presented issue 5 to the Washington Supreme Court as a federal constitutional violation, Burton had presented the issue to the Washington Court of Appeals as a mere error of state law. *Compare* Exhibit 36, at 8-10, with Exhibit 40, at 18-19.

The Washington Supreme Court denied review on December 3, 1997. Exhibit 41, Order, *State v. Burton,* Supreme Court Cause No. 65706-8; *State v. Burton,* 133 Wn.2d 1025, 950 P.2d 475 (1997); Exhibit 42, Mandate, *State v. Burton,* Court of Appeals Cause No. 35747-6-I. The Supreme Court denied certiorari on April 20, 1998. *Burton v. Washington,* 118 S.Ct. 1533 (1998).

III. ISSUES

The petition filed under cause number C98-1844L raises the following grounds for relief:

1. Conviction obtained by plea of guilty which was unlawfully obtained when the state made a promise which it did not fulfill at re-sentencing.

2. Denial of effective assistance of counsel.

See Petition, Cause Number C98-1844L, at 5.

The petition filed under cause number C98-1846L raises the following grounds for relief:

> 1. Whether the error of using Mr. Burton's prior but reversed conviction for rape of a child in the third degree to corroborate witnesses testimony and to impeach Mr. Burton was harmless beyond a reasonable doubt?

2. Whether the trial court denied Mr. Burton his right to compel witnesses and present evidence in his defense by refusing to allow testimony of an Indiana prison official who could have testified that the State's primary jailhouse informant did not have access to Mr. Burton, and by refusing to allow Mr. Burton to admit letters and affidavits from the State's primary jailhouse informant which provided that his testimony and previous statements were coerced, bribed and perjurious?

3. Whether Mr. Burton was denied his right to confrontation by the State's attempt to impeach him with unproven innuendo?

4. Whether the multitude of trial errors cumulatively denied Mr. Burton of a fair trial?

See Petitioner's Memorandum, Cause No. C98-1846L, at 18.

IV. EXHAUSTION OF STATE REMEDIES

1. Claims Under Cause No. C98-1844L:

Burton properly exhausted claim 1. Burton failed to properly exhaust claim 2 because he never presented the claim to the Washington Supreme Court. Claim 2 is now procedurally barred.

2. Claims Under Cause No. C98-1846L:

Burton properly exhausted claim 1 and claim 4. Burton failed to present claim 3 to the Washington Supreme Court as a federal constitutional violation. Burton also raised claim 2 as a federal constitutional violation for the first and only time when seeking discretionary review. Burton failed to fairly present claim 2 to the state courts.

Claims 2 and 3 are now procedurally barred under Washington law.

V. EVIDENTIARY HEARING

Under the AEDPA, Burton is not entitled to an evidentiary hearing in a habeas corpus proceeding unless he shows:

> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. . . .

28 U.S.C. § 2254(e)(2).

Burton bears the burden of showing the necessity of a hearing. *Pulley v. Harris,* 692 F.2d 1189, 1197 (9th Cir. 1982), *rev'd on other grounds,* 465 U.S. 37 (1984). An evidentiary hearing is not required unless Burton "alleges *facts* which, if proved, would entitle him to relief." *Townsend v. Sain,* 372 U.S. 293, 312 (1963) (emphasis added). A hearing is not required if the claim presents a purely legal question, or if the claim may be resolved by reference to the state court record. *Campbell v. Wood,* 18 F.2d 662, 679 (9th Cir.) (*en banc*), *cert. denied,* 114 S. Ct. 2125 (1994). No

hearing is required where the state court has heard the factual dispute and entered findings of facts. *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992).

VI. STANDARD OF REVIEW

State court judgments carry a presumption of finality and legality. *McKenzie v. McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994). Federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991). The petitioner must prove his custody violates the Constitution, laws or treaties of the United States. *McKenzie*, 27 F.3d at 1418-19. If a petitioner establishes a constitutional trial error, the Court must determine if the error caused actual and substantial prejudice. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993). New rules of criminal procedure are not applicable to cases that became final before the new rule is announced unless the new rule: (1) decriminalizes certain conduct or prohibits the imposition of certain types of punishment for a class of defendants; or (2) constitutes a watershed rule of criminal procedure. *Teague v. Lane*, 489 U.S. 288, 310-12 (1989).

VII. ARGUMENT

A. CLAIM 2, UNDER CAUSE NO. C98-1844L, AND CLAIMS 2 AND 3, UNDER CAUSE NO. C98-1846L, ARE PROCEDURALLY BARRED UNDER AN INDEPENDENT AND ADEQUATE STATE LAW.

1. Burton Failed To Fairly Present The Claims To The Washington Supreme Court.

A state prisoner must exhaust state remedies with respect to each claim before petitioning for a writ of

habeas corpus in federal court. *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Claims for relief that have not been exhausted in state court are not cognizable in a federal habeas corpus petition. *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 333 (1994).The exhaustion doctrine is based upon comity, not jurisdiction. *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

A claim must be "fully and fairly" presented to the state's highest court so as to give the state courts a fair opportunity to apply federal law to the facts. *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270, 276-78 (1971). The petitioner must present the claims to the state's highest court, even where such review is discretionary. *Larche v. Simons*, 53 F.3d 1068, 1071-72 (9th Cir. 1995). A petitioner does not satisfy the exhaustion requirement merely by presenting his claims to the state court for the first and only time in a motion for discretionary review. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Ortberg v. Moody*, 961 F.2d 135, 138 (1992). "[W]here the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reasons therefor,'" the claim has not been fairly presented to the state courts and therefore the claim is not exhausted. *Castille*, 489 U.S. at 351.

Petitioners must alert state courts "to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan v. Henry*, 115 S. Ct. 887, 888 (1995). A petitioner must expressly apprise the state courts that an alleged error is not only a violation of state law, but a violation of the Constitution. *Id.* "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted

regardless of its similarity to the issues raised in state court." *Johnson v. Zenon*, 88 F.3d 828, 830-31 (9th Cir. 1996).

A petitioner must "include reference to a specific federal constitutional guarantee. . . . " *Gray v. Netherland*, 116 S. Ct. 2074, 2081 (1996). Vague references to a broad constitutional principle do not satisfy the exhaustion requirement. *Id.* ("it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court."). Even where the petitioner argues an error deprived him of a "fair trial" or the "right to present a defense", unless the petitioner expressly states he is alleging a specific federal constitutional violation, the petitioner has not properly exhausted the claim. *Johnson*, 88 F.3d at 830-31.

The fact that a petitioner's state law claim was "essentially the same" as the claim subsequently asserted in federal court does not satisfy the exhaustion requirement. The Ninth Circuit held that *Duncan v. Henry* implicitly overruled the rule in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986). *Johnson*, 88 F.3d at 830 ("After *Duncan*, *Tamapua's* 'essentially the same' standard is no longer viable."). Citation to Washington case law, even if the case applied a standard similar to the federal standard, does not suffice to apprise the Washington courts of a federal claim.

It is the petitioner's burden to prove that a claim has been properly exhausted and is not procedurally barred. *Lambrix v. Singletary*, 117 S. Ct. 1517, 1523 (1997), *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Miranda v.*

Cooper, 967 F.2d 392, 398 (10th Cir.), *cert. denied*, 113 S. Ct. 347 (1992). Presentation of *some* constitutional claims in state court does not preserve in federal court all the petitioner's other claims. *Aldridge v. Dugger*, 925 F.2d 1320, 1326 (11th Cir. 1991); *Weeks v. Jones*, 26 F.3d 1030, 1044 (11th Cir. 1994).

Burton failed to present claim 2, cause number C98-1844L, to the Washington Supreme Court in any form. *See* Exhibit 31. Burton did present the factual basis of claim 3, cause number C98-1846L, to the Washington Supreme Court, but he did not specifically allege a federal constitutional violation. *See* Exhibit 40, at 13-18. Burton therefore failed to properly exhaust these two claims.

Burton presented claim 2, cause number C98-1846L, to the Washington Supreme Court as a federal constitutional violation. Exhibit 40, at 18-19. However, Burton presented the issue to the Washington Court of Appeals as a mere error of state law. Exhibit 36, at 8-10. Raising the claim as a federal issue for the first time on discretionary review did not properly exhaust the claim. *Castille*, 489 U.S. at 351.

2. Burton's Claims Are Procedurally Barred Under State Law.

If a petitioner fails to obey state procedural rules, the state court may decline review of a claim based on that procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). State procedural rules serve an important interest in finality of judgment, and significant harm may result if the federal courts fail to respect those rules. *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *Francis v. Henderson*, 425 U.S. 536, 538-39 (1976). If the state court

clearly and expressly states that its judgment rests on a state procedural bar, the petitioner is barred from asserting the same claim in a federal habeas corpus proceeding. *Harris v. Reed*, 489 U.S. 255, 263 (1989); *Noltie v. Peterson*, 9 F.3d 802, 805 (9th Cir. 1993). The federal court must honor the state's procedural bar ruling even if the state court reaches the merits of the federal claim in an alternative holding. *Harris*, 489 U.S. at 264 n. 10; *Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1447 n. 2 (9th Cir. 1989). A claim is also barred, despite the absence of a "plain statement", where the petitioner failed to exhaust state remedies and the state courts would now find the claim to be procedurally barred. *Noltie*, 9 F.3d at 805.

Burton is now barred from presenting his claims to the Washington Supreme Court. Under Washington law, a defendant may not file a collateral challenge to a judgment and sentence more than one year after the judgment becomes final. RCW 10.73.090. Burton's judgment on his 1992 convictions became final for the purposes of RCW 10.73.090 on January 16, 1998, when the Washington Court of Appeals issued its mandate. RCW 10.73.090(3)(b); Exhibit 33. Burton's judgment on his 1994 convictions became final when the United States Supreme Court denied the petition for writ of certiorari on April 20, 1998. RCW 10.73.090(3)(c); *Burton v. Washington*, 118 S.Ct. 1533 (1998). Because it is more than one year since the judgments became final, and the claims do not meet the exceptions in RCW 10.73.100, the claims are time barred.

Washington law also prohibits the filing of successive collateral challenges. RCW 10.73.140; RAP 16.4(d). A court must dismiss a personal restraint petition if the petitioner either raised the same claim in a prior petition, or the petitioner fails to show good cause for not having raised

the new claim in the earlier petition. Because Burton previously filed personal restraint petitions challenging his convictions, the Washington courts will dismiss any petition challenging the convictions without considering the merits of the claims.

Claim 2, under cause number C98-1844L, and claims 2 and 3, under cause number C98-1846L, are procedurally barred. Because Burton cannot show cause and prejudice, or a fundamental miscarriage of justice, the claims are not cognizable in federal court.

B. BURTON IS NOT ENTITLED TO RELIEF ON CLAIM 1, CAUSE NO. C98-1844L, AND CLAIMS 1 AND 4, CAUSE NO. C98-1846L, BECAUSE THE STATE COURT DECISIONS DENYING THE CLAIMS WERE NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) worked substantial changes to the law of habeas corpus. *Moore v. Calderon*, 108 F.3d 261, 263 (9th Cir., *cert. denied*, 117 S. Ct. 2497 (1997). The AEDPA applies because Burton filed his petition after April 24, 1996. *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). A petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d). State

court findings of fact are presumed correct unless the petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The AEDPA eliminated the eight statutory exceptions found under former 28 U.S.C. § 2254(d).

The Court must respect the legal conclusions of the state courts unless the conclusions are contrary to or involve an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d). Although the terms "contrary to" and "unreasonable application" are not amenable to a rigid distinction and have overlapping meanings, "[t]he terms, read together, delineate the range of cases that warrant federal habeas relief." *Davis v. Kramer*, 167 F.3d 494, 500 (9th Cir. 1999). "[B]oth terms reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court." *Id.*

"A state court decision may not be overturned on habeas review, for example, because of a conflict with Ninth Circuit-based law, but rather a writ may issue only when the state court decision is 'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court." *Moore*, 108 F.3d at 264-65. Federal law is not clearly established "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301.

1. The Washington Courts Reasonably Determined The State Did Not Breach The Plea Agreement (Claim 1, C98-1844L).

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be

said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). A prosecutor's failure to comply with such a significant term of a plea agreement may, in some circumstances, render a plea involuntary. *Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *United States v. Read*, 778 F.2d 1437, 1440 (9th Cir. 1985). Although plea agreements are a matter of criminal jurisprudence, a plea bargain is contractual in nature and is measured by contract-law standards. *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985); *United States v. De La Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993); *United States v. Myers*, 32 F.3d 411, 413 (9th Cir. 1994). Disputes over the terms of the agreement are determined by objective standards. *Read*, 778 F.3d at 1441.

In *United States v. Roberson*, 896 F.2d 388, 389 (9th Cir. 1990), the government agreed to recommend a sentence of five years imprisonment, with a consecutive five year suspended sentence and five years probation. *Id.* The government lived up to this agreement at entry of the plea and at sentencing. *Id.* at 392. Roberson later moved to correct his sentence under Rule 35(b), contending that factual inaccuracies existed in the pre-sentence investigation report. *Id.* at 389. At the Rule 35 hearing, the government attorney stated that "a sentence of ten years is not unreasonable." *Id* at 392. Roberson contended that the government breached the plea agreement. *Id.* Rejecting Roberson's claim, the Ninth Circuit held:

> We do not consider this statement to be a breach of the plea agreement. It was but one isolated comment in an extensive response to Roberson's contention that the sentence was illegal. In examining the argument as a whole we

> conclude that the government was merely defending the legality of the sentence. Perhaps it would have been preferable for government counsel to have described the sentence as "legal" instead of saying that it was "not unreasonable," but this one phrase did not vitiate the bargain. Fidelity to a plea bargain is measured by total conduct that manifests the spirit and intention of the parties; it is not measured by quibbling over an isolated fragment of the government's presentation. The government did not renege either at the time the plea was accepted or at sentencing. Under these circumstances we are persuaded that no breach of the plea agreement took place.

Roberson, 896 F.2d at 392.

In Burton's case, the prosecution complied with the terms of the plea agreement by recommending a 90 month sentence at the time of Burton's original sentencing in 1992. *See* Exhibits 8 and 9. The prosecution again recommended a 90 month sentence when Burton moved to amend his judgment and sentence in 1995. *See* Exhibit 23. At the subsequent hearing to amend the judgment and sentence, in response to Burton's question, the prosecutor did state that he would recommended 102 months. Exhibit 9, at 27. However, as in *Roberson*, this isolated comment did not constitute a breach.

The Washington Court of Appeals reasonably rejected Burton's claim, finding the prosecution did not violate the terms of the plea agreement:

> Due process requires the prosecutor to adhere to the terms of a plea agreement. *State v. Coppin*, 57 Wn. App. 866, 871, 791 P.2d 228, *review denied*, 115 Wn.2d 1011 (1990). A prosecutor breaches the plea agreement by recommending a

longer sentence or by otherwise failing to act as agreed. *In re James*, 96 Wn.2d 847, 640 P.2d 18 (1982). A defendant may be entitled to relief even if the breach was inadvertent. *State v. Collins*, 46 Wn. App. 636, 639, 731 P.2d 1157, *review denied*, 108 Wn.2d 1026 (1987); *Santobello v. United States*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) (new prosecutor inadvertently breached plea agreement by recommending longer sentence). When the prosecution has breached a plea agreement, the defendant is generally entitled to choose either specific enforcement or withdrawal of the guilty plea "unless there are compelling reasons not to allow that remedy." *State v. Miller*, 110 Wn.2d 528, 535, 756, 756 P.2d 122 P.2d 122 [sic] (1988).

Burton's arguments might be more persuasive if the prosecutor's remarks had occurred during the original sentencing hearing. As the prosecutor explained, however, he was presenting the court with an order that had been worked out with Burton's prior attorney and reflected the court's intention to impose the same sentence on count II. Moreover, although the hearing was held for the purpose of resentencing, the change in offender scores affected only counts I and IV; the standard range for count II remained the same. In the motion to amend the judgment and sentence, Burton's counsel had noted this fact and expressly asked the court to impose the same term that it had imposed originally (102 months). Indeed, Burton has never raised any argument identifying some basis for changing the sentence on count II.

In sum, as to count II, the hearing was not a substantive sentencing hearing at which the

> State was obligated to present a formal recommendation in accordance with the plea agreement. Viewed in context, the deputy prosecutor's "recommendation," which was solicited by Burton and not the trial court, constituted an acknowledgment of matters that had already been decided or that were not disputed and did not constitute a breach of the State's obligation under the terms of plea agreement. Accordingly, the trial court did not err in denying Burton's motion to withdraw his guilty plea. Moreover, even if the State's "recommendation" could be characterized as a technical breach of the plea agreement, it did not, under the circumstances, rise to the level of a "manifest injustice" that would require withdrawal under CrR 4.2(f).

Exhibit 5, at 5-7. This decision is not contrary to or an unreasonable application of clearly established federal law.

2. The State Courts Reasonably Found The Prior Conviction Evidence Did Not Prejudice Burton (Claim 1, C98-1846L).

"[A] federal habeas court may not prescribe evidentiary rules for the states." *Swan v. Peterson*, 6 F.3d 1373, 1382 (9th Cir. 1993). Alleged errors in the admission of the evidence are generally a matter of state law and are not cognizable in a federal habeas corpus proceeding. *Estelle v. McGuire*, 112 S. Ct. 475 (1991); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). Alleged errors are cognizable only when the evidence rendered the trial fundamentally unfair. *Gordon v. Duran*, 895 F.2d 610, 613 (9th Cir. 1990).

The Supreme Court has clearly established that "the use of convictions constitutionally invalid under *Gideon v. Wainwright* to impeach a defendant's credibility deprives him of due process of law." *Loper v. Beto*, 405 U.S. 473, 483 (1972). This is because "the principle established in *Gideon* goes to 'the very integrity of the fact-finding process' in criminal trials, and that a conviction obtained after a trial in which the defendant was denied the assistance of a lawyer 'lacked reliability.'" *Loper*, 405 U.S. 483-84. However, the Supreme Court has not clearly established that due process prohibits impeachment with prior convictions which are invalid for reasons other than a *Gideon* violation. *See United States v. Garcia*, 771 F.2d 1369 (9th Cir. 1985) (admission of allegedly invalid state convictions as basis to revoke probation did not violate due process); *Smith v. Collins*, 964 F.2d 483, 486 (5th Cir. 1992) (reliance on *Loper* misplaced where prior convictions were invalidated because the indictments contained technical defects); *but see United States v. Fisher*, 106 F.3d 622, 629-30 (5th Cir. 1997) (rule applies to constitutional infirmities arising from lack of notice). Because the Supreme Court has not clearly established the rule asserted, Burton is not entitled to relief. Even if the rule applied, however, Burton is not entitled to relief unless the error caused actual and substantial prejudice. *Brecht*, 113 S. Ct. at 1722; *see also Tucker v. United States*, 431 F.2d 1292, 1293 (9th Cir. 1970), *aff'd*, 404 U.S. 443 (1972) (harmless error rule applied to *Burgett* errors); *Bates v. Nelson*, 485 F.2d 90 (9th Cir. 1974) (same).

The Washington Court of Appeals reasonably held that use of the impeachment evidence did not violate due process and did not prejudice Burton's defense:

At trial the court allowed the State to admit as an unnamed felony the Snohomish County conviction for rape of a child in the third degree, involving J.L.

Later, on April 24, 1995, this court reversed that conviction. *State v. Burton*, No. 31432-7-I (filed April 24, 1995). On remand, Burton pleaded guilty on October 6, 1995, to misdemeanor assault. He then moved the trial court for a new trial in the present matter. The trial court denied the motion without argument. Burton assigns error to this ruling. He contends the reversal of the Snohomish County conviction retroactively renders erroneous and incurably prejudicial the admission of that conviction to impeach his credibility in the trial of the M.C. matter, requiring reversal of his present conviction.

The pending appeal of a prior conviction does not render the prior conviction inadmissible at the time of trial. ER 609. The issue arises later, if and when the prior conviction is reversed. The question then becomes whether the constitutional error in the prior conviction rendered the fact-finding process in that prior case inherently unreliable. *See State v. Murray*, 86 Wn.2d 165, 167-68,.543 P.2d 332 (1975). A violation that goes to the "very integrity of the fact-finding process" requires reversal. *Murray*, 86 Wn.2d at 168, 543 P.2d 332.

The leading case defining the standard of review in such matters is *Loper v. Beto*, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972). In *Loper* the defendant was charged with statutory rape of an eight-year-old. The only two witnesses were the victim and the defendant. The defendant was impeached with four prior convictions, each of which had been obtained without the benefit of counsel as guaranteed by *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792,

9 L. Ed. 2d 799 (1963). In *Loper*, "the issue of innocence or guilt . . . turned entirely on whether the jury would believe the testimony of an 8-year-old girl or that of Loper. And the sole purpose for which the prior convictions were permitted to be used was to destroy the credibility of Loper's testimony in the eyes of the jury." *Loper*, 405 U.S. at 482. Thus the Court answered affirmatively the question whether "the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?" *Loper*, 405 U.S. at 480.

This court followed *Loper* in a case where the defendant's theft conviction was based in part on impeachment evidence of a prior perjury conviction, and the prior perjury conviction was subsequently reversed for insufficient evidence, "a constitutional defect of the highest magnitude." *State v. White*, 31 Wn. App. 655, 666, 644 P.2d 693 (1982). In its harmless error analysis the *White* court said:

> A review of the record reveals sufficient evidence from which the jury could have inferred guilt without knowing of the tainted conviction. It is far from certain, however, that they would have so inferred. We cannot divine what weight the jury must have given to the perjury conviction in deciding whether to believe White's testimony, but we intuit that a conviction for perjury would have a great adverse effect.

White, 31 Wn. App. at 666, 644 P.2d 693. Accordingly, the *White* court reversed.

In contrast, our Supreme Court found *Loper* did not compel reversal in *State v. Murray* where the error in the prior conviction was a violation of the

exclusionary rule. The exclusionary rule is prophylactic; a violation of the exclusionary rule by the State does not impair the fact-finding process. Therefore, the use for impeachment of a conviction later reversed for a Fourth Amendment error does not violate the defendant's right to due process.

Unlike the situation in *Murray*, the constitutional error in Burton's Snohomish County conviction did go to the very integrity of the fact-finding process. The reversal was, as in *Loper*, due to a confrontation violation that denied Burton the right to a fair trial. Specifically, the prosecutor impeached Burton with statements he allegedly made, failed to prove them up, and used the unproved statements in closing argument.

But witness credibility was not central in Burton's trial in the M.C. matter as it was in *Loper*. The admission of the void conviction involving J.L. was merely cumulative of other impeaching evidence and, as discussed above, the Martin letter alone was overwhelming evidence of Burton's guilt.

The question is whether the conviction "might well have influenced the outcome of the case" such that it deprived Burton of due process. *Loper*, 405 U.S. at 480. Burton's conviction for the rape of J.L. came in as an unnamed felony and therefore could not have been as influential on the issue of Burton's veracity as was the admission of the named perjury conviction in *White*.

In summary, it is highly unlikely that the admission of the unconstitutionally obtained prior conviction influenced the outcome of the present case. We therefore hold that the trial court did not err in refusing to grant a new trial on this basis.

Exhibit 6, at 17-20.

Because this decision was not contrary to or an unreasonable application of clearly established federal law, Burton is not entitled to relief.

3. The Washington Courts Reasonably Determined That Burton Is Not Entitled To Relief Based Upon Cumulative Error (Claim 4, Cause No. C98-1846L).

The United States Supreme Court has never recognized cumulative error as a basis for federal habeas relief. *See Griffin v. Delo*, 33 F.3d 895, 903 (8th Cir. 1994). Although the Ninth Circuit has relied on cumulative error in certain limited circumstances, *see e.g., Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995) and *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir.), *cert. denied*, 113 S. Ct. 1363 (1992), when a petitioner fails to demonstrate prejudice arising from any single error, he is not entitled to relief under a cumulative error analysis. *Thompson v. Calderon*, 109 F.3d 1358, 1369 (9th Cir. 1996) ("Finding no prejudice from the errors considered separately, we also find no cumulative prejudice."). *Hunt v. Smith*, 856 F. Supp. 251, 258 (D. Md. 1994) ("The fact that many claims of . . . error are pressed does not alter fundamental math – a string of zeros still adds up to zero.").

Because the Supreme Court has not clearly established a rule of cumulative error, the state court decision denying this claim was reasonable:

> Burton claims that the errors in his case, if not prejudicial individually, are prejudicial cumulatively. He has not shown that any prejudice arising from each error had a cumulative effect, as in *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250

(1992), and *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Here, harmlessness is based on the decisive, untainted evidence of Martin's letter. The errors and irregularities do not undermine that evidence and therefore do not have a cumulative effect.

Exhibit 6, at 20-21.

Because the state court decision was not contrary to or an unreasonable application of clearly established federal law, Burton is not entitled to habeas corpus relief.

VIII. CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court deny Burton's consolidated petitions.

DATED this 3rd day of May, 1999.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General

/s/ John J. Samson
JOHN J SAMSON, WSBA #22187
Assistant Attorney General
Attorney General's Office
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445

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No. 05-9222

IN THE
Supreme Court of the United States

LONNIE L. BURTON,
Petitioner,

v.

DOUG WADDINGTON,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

MOTION TO FILE
SUPPLEMENTAL BRIEF FOR PETITIONER

Brian Tsuchida
Laura Mate
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT
OF WASHINGTON
1601 Fifth Avenue
Suite 700
Seattle, WA 98101

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Thomas C. Goldstein
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 25.5 of the Rules of this Court, Petitioner Lonnie Burton respectfully submits this supplemental brief to present a new authority that was not available at the time he filed his briefs on the merits or presented oral argument – specifically, the Washington Supreme Court's decision in *In re Personal Restraint Petition of VanDelft*, ___ P.3d ___, 2006 WL 3438048 (Wash. Nov. 30, 2006). The decision is reproduced in the accompanying Appendix.

In *VanDelft*, the Washington Supreme Court holds – consistent with the Washington Court of Appeals' recent decision in *State v. Washington*, 143 P.3d 606 (Wash. App. 2006), to which Petitioner adverted at oral argument, *see* Tr. of Oral Arg. 6 (Nov. 7, 2006) – that a sentence imposed exactly as Petitioner's was violated this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). The Washington Supreme Court explains that in order to run two sentences consecutively under Wash. Rev. Code § 9.94A.589(1)(a) (codified at § 9.94A.400 when Petitioner was sentenced), a trial court must make a factual finding "beyond the jury verdict." App. 11a. The Washington Supreme Court then reaffirms its prior holding in *State v. Hughes*, 110 P.3d 192 (Wash. 2005), that a finding that allowing a current offense to go unpunished is "clearly too lenient" is "a factual determination" that is covered by *Blakely*. App. 12a (quoting *Hughes*, 110 P.3d at 203). (*Hughes* explained that such a finding under longstanding Washington law is factual in nature because it requires a court to conclude that there was "some extraordinarily serious harm or culpability resulting from [the] multiple offenses." 110 P.3d at 202 (quotation omitted).).

The state-law underpinnings of *VanDelft* are, of course, binding on this Court. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975). And they belie the State's representation here (*see* Resp. Br. 43-49 and Tr. of Oral Arg. 35) that no

factual finding beyond the jury verdict was necessary to run Petitioner's sentences consecutively. Finally, while the question whether Petitioner is ultimately entitled to federal habeas relief is not at issue here, *see* Petr. Reply Br. 19-20, the *VanDelft* decision rebuts the State's contention (*see* Resp. Br. 48) that Petitioner is not eligible for such relief because the trial court's decision to run his sentences consecutively did not violate *Blakely*. It is now beyond dispute that this case is a suitable vehicle to decide the questions presented concerning the retroactivity of *Blakely* because Petitioner has a serious argument for habeas relief.

CONCLUSION

For the forgoing reasons, as well as those stated in Petitioner's opening and reply briefs, this Court should reverse the decision of the Court of Appeals and remand the case for further proceedings.

Respectfully submitted,

Brian Tsuchida
Laura Mate
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT
OF WASHINGTON
1601 Fifth Avenue
Suite 700
Seattle, WA 98101

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT LITIGATION CLIN
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Thomas C. Goldstein
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

December 2006

2006 WL 3438048

Supreme Court of Washington.
In the Matter of the PERSONAL RESTRAINT
Petition OF William Raymond VANDELFT,
Petitioner.
No. 77733-1.

Nov. 30, 2006.

Appeal from Spokane Superior Court, 01-1-02317-0, Honorable Richard J. Schroeder, J.

Sheryl Gordon McCloud, Attorney at Law, Seattle, WA, for Petitioner.

Steven J. Tucker, Attorney at Law, Andrew J. Metts III, Spokane County Pros Offc, Spokane, WA, for Respondent.

BRIDGE, J.

¶ 1 William VanDelft was convicted of six crimes arising from five incidents in which he initiated contact with different boys and propositioned them for sex, using varying degrees of threats or violence. In this personal restraint petition, his second, VanDelft argues that the trial court's sentencing violated *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), by requiring VanDelft's sentence for kidnapping in the second degree with sexual motivation (count 1) to be served consecutively to his sentences for all other counts pursuant to RCW 9.94A.589(1)(a). We hold that since VanDelft's judgment and sentence became final after *Blakely* was decided and the principles announced in Blakely apply to consecutive sentences imposed under RCW 9.94A.589(1)(a), the trial court erred when it imposed count 1 consecutively

because the trial judge, not the jury, found that a concurrent sentence would be clearly too lenient.

I

Statement of Facts and Procedural History

¶ 2 VanDelft was convicted by a jury on April 3, 2002 in Spokane County Superior Court of one count of kidnapping in the second degree with sexual motivation (count 1), two counts of attempted kidnapping in the first degree with sexual motivation (counts 3 and 6), two counts of communication with a minor for immoral purposes (counts 2 and 4), and one count of intimidation with a dangerous weapon (count 5). The kidnapping and attempted kidnapping convictions were felonies, while the others were gross misdemeanors. RCW 9.41.270; RCW 9.68A.090; RCW 9A.40.020, .030; RCW 9A.28.020. The jury returned special findings of sexual motivation on the kidnapping and attempted kidnapping charges. The jury also returned special verdicts finding VanDelft used a deadly weapon other than a firearm when committing the second degree kidnapping and one of the attempted first degree kidnappings.

¶ 3 The convictions were based on five separate incidents that occurred between June 13 and September 12, 2001. *State v. VanDelft,* noted at 118 Wn.App. 1071, 2003 Wash.App. LEXIS 2364, at *2, *review denied,* 151 Wn.2d 1026, *cert. denied,* 543 U.S. 960 (2004).[1] The incidents

[1] In each incident, VanDelft engaged the boy in conversation and then attempted to lure or threaten the boy into his car. In some cases he explicitly asked for or demanded sexual favors, and in some cases he used a knife or gun to threaten violence if the boy refused to comply. *VanDelft,* 2003 Wash.App. LEXIS 2364, at *1-4 n. 1-n.4.

involved five boys, 11 to 14 years old, and took place at various locations around Spokane. In the only incident at issue here, VanDelft struck up a conversation with an 11-year-old and offered him a ride. VanDelft then grabbed the boy and pulled out a knife, but the boy was able to run away. VanDelft chased the boy and managed to pin him down, but the boy escaped again. For this incident, VanDelft was convicted of kidnapping in the second degree with sexual motivation (count 1).

¶ 4 VanDelft was sentenced on July 12, 2002. The sentence for each individual crime was within its standard sentencing range. RCW 9.94A.589(1)(b) expressly required the court to run the sentences for the two attempted first degree kidnapping counts consecutively because they are statutorily defined as serious violent offenses. The court also ordered the sentences for the second degree kidnapping (96 months for count 1) and the three gross misdemeanors to run consecutively to each other and to all other charges. The result was that each sentence would be served consecutively for a total of 315 months.

¶ 5 To support its conclusion that count 1 would be served consecutively to the other felony sentences even though it was not a serious violent offense, the trial judge entered findings of fact and conclusions of law. The judge found that the jury returned special verdicts finding sexual motivation on each of counts 2, 3, and 6 and deadly weapon enhancements on counts 1 and 6. He found that the defendant had an offender score of 15 on each of the three felony convictions. He found the sentences in the two attempted first degree kidnapping convictions would necessarily run consecutive to each other by operation of RCW 9.94A.589(1)(b). Finally, he found [t]hat given the defendant's offender score and that the crimes involved

several distinct criminal acts against five different victims, a concurrent sentence on Count I to the two serious violent offenses in Counts III and VI, would fail to hold the defendant accountable for all of the crimes for which he was convicted, since he would serve no additional time for Count I.

Findings of Fact and Conclusions of Law at 2. The court then ruled that a concurrent sentence on count 1 would result in a sentence that was "clearly too lenient" and determined that the sentence for count 1 would run consecutive to all other counts in this case. *Id.* at 3.

¶ 6 VanDelft appealed his convictions but not his sentence. *VanDelft,* 2003 Wash.App. LEXIS 2364, at *1. The Court of Appeals affirmed VanDelft's convictions in an unpublished opinion on October 16, 2003, and this court denied his petition for review on June 2, 2004. *Id.*; *State v. VanDelft,* 151 Wn.2d 1026, 94 P.3d 960 (2004). The Court of Appeals issued its mandate terminating review on June 16, 2004. In the meantime, in February 2004, VanDelft filed his first personal restraint petition in the Court of Appeals. That petition was dismissed on July 1, 2004. In his direct appeal, VanDelft had also filed a petition for writ of certiorari in the United States Supreme Court on June 25, 2004, which was ultimately denied on November 1, 2004. *VanDelft v. Washington,* 543 U.S. 960, 125 S.Ct. 417, 160 L.Ed.2d 325 (2004).

¶ 7 VanDelft, acting pro se, filed his second personal restraint petition at the Court of Appeals in February 2005, arguing his sentence violated *Blakely.* The Chief Judge of the Court of Appeals dismissed this personal restraint petition, relying on *State v. Evans,* 154 Wn.2d

438, 448-49, 114 P.3d 627, *cert. denied,* 126 S.Ct. 560 (2005), in which we held that *Blakely* does not apply retroactively to convictions already final when *Blakely* was decided. VanDelft then filed a motion for discretionary review in this court seeking review of the order dismissing his petition, which was granted.

II

Analysis

¶ 8 VanDelft argues that his convictions were still pending on review and not yet final when *Blakely* was decided. He asserts that the principles set forth in *Blakely* must be applied to his sentence, and he contends that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violates *Blakely.* The State asserts that after this court's decision in *State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005), *Blakely* does not apply to consecutive sentences that are otherwise within the standard range. The State also argues that VanDelft's petition should be barred because it is successive.

¶ 9 *Finality:* We have held that Blakely introduced a new rule of criminal procedure. *Evans,* 154 Wn.2d at 448. We apply a new rule for the conduct of criminal prosecutions retroactively "to all cases, state or federal, pending on direct review or not yet final." *In re Pers. Restraint of St. Pierre,* 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing *Grifith v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). The Court of Appeals dismissed this personal restraint petition because the mandate on VanDelft's direct appeal was issued on June 16, 2004, but *Blakely* was not decided until June 24, 2004. Yet under Washington law, a judgment becomes final on the last of

the following dates: when the judgment is filed with the clerk of the trial court, when the appellate court issues its mandate terminating direct review, *or* when "the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal." RCW 10.73.090(3); *see also Grifith,* 479 U.S. at 321 n. 6. The United States Supreme Court denied VanDelft's petition for writ of certiorari on November 1, 2004, more than four months after *Blakely* was decided, so VanDelft's direct appeal was still pending and not yet final when *Blakely* was decided. The Court of Appeals erred when it dismissed VanDelft's petition.

¶ 10 *Successive Petition:* In its answer to VanDelft's motion for discretionary review, the State contends that the Court of Appeals correctly dismissed this petition, VanDelft's second, because it is successive. Under either RCW 10.73.140 (which applies only to the Court of Appeals) or RAP 16.4(d) (which applies to this court), a successive petition for similar relief must be dismissed absent good cause shown. *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 262-63, 36 P.3d 1005 (2001). Yet this is true only where the relevant issue was previously heard and determined on the merits. *Id.* at 263. In addition, a new issue cannot be raised in a successive petition to the Court of Appeals without a showing of good cause for the failure to raise the issue earlier. RCW 10.73.140.[2]

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[2] New issues in successive petitions are barred in this court by way of the abuse of the writ doctrine, which applies only where the petitioner has been represented by counsel throughout postconviction proceedings. In addition, the doctrine does not apply where the new issue is based on an intervening change in the law. *In re Pers. Restraint of Stenson,* 153 Wn.2d 137, 144-45, 102 P.3d 151 (2004).

¶ 11 When VanDelft filed his first personal restraint petition in February 2004, *Blakely* had not yet been decided. An intervening change in the law material to the petitioner's case can amount to good cause for a successive petition, and as noted above, *Blakely* announced a new rule. *Evans,* 154 Wn.2d at 448; *In re Pers. Restraint of Crabtree,* 141 Wn.2d 577, 583, 9 P.3d 814 (2000). Thus, Van Delft's personal restraint petition cannot be dismissed as successive because it raised a new issue not previously heard and determined on the merits, and there was good cause for not raising the issue previously. We therefore proceed to consider the merits of VanDelft's petition.

¶ 12 Blakely *Challenge to the Consecutive Sentence for Count 1:* VanDelft contends that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violates the principles set forth in *Blakely.* RCW 9.94A.589 determines whether multiple felony convictions are sentenced concurrently or consecutively. Under RCW 9.94A.589(1)(b) (hereinafter (1)(b)), sentences for separate and distinct serious violent offenses, including attempted first degree kidnapping, "shall be served consecutively to each other and concurrently with sentences [for other felonies] imposed under (a) of this subsection." *See also* RCW 9.94A.030(41). Felonies that are not serious violent offenses "shall be served concurrently" under RCW 9.94A.589(1)(a) (hereinafter (1)(a)). Consecutive sentences for (1)(a) crimes may be imposed only "under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).[3] Second degree kidnapping, the offense at

[3] Ordinarily, the multiplicity of separate and distinct nonserious violent felonies is accounted for under (1)(a) when each count is considered as criminal history with respect to the others, increasing the

(Continued on following page)

issue here, is not a serious violent offense, and therefore (1)(a) governs sentencing for that crime. RCW 9.94A.030(41).

¶ 13 RCW 9.94A.535 reiterates that a departure from the presumption of concurrent sentences for nonserious violent felonies is an exceptional sentence. At the time that VanDelft was sentenced, the illustrative factors listed in RCW 9.94A.535 that could support an exceptional sentence without additional jury findings included "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." Former RCW 9.94A.535(2)(i) (2002).

¶ 14 In this case, counts 3 and 6 (attempted first degree kidnapping with sexual motivation) were properly classified as separate and distinct serious violent offenses, and VanDelft concedes that they were appropriately sentenced consecutively under (1)(b). Pet'r's Suppl. Br. at 7-8. VanDelft also concedes that the statutory presumption of concurrent sentencing contained in (1)(a) does not apply to gross misdemeanors, and he does not challenge the consecutive sentencing for the three gross misdemeanors in this case.[4] *Id.* The consecutive sentence for count 1 (96 months for second degree kidnapping with sexual

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offender score for each count for purposes of calculating the standard range for each offense. RCW 9.94A.589(1)(a); *State v. Batista*, 116 Wn.2d 777, 783, 808 P.2d 1141 (1991).

[4] The maximum imprisonment for gross misdemeanors is one year where the punishment is not otherwise fixed by statute. RCW 9.92.020. The Sentencing Reform Act of 1981 (chapter 9.94A RCW), including RCW 9.94A.589, does not apply to misdemeanors. RCW 9.94A.010; *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003); *State v. Whitney*, 78 Wn.App. 506, 517, 897 P.2d 374 (1995).

motivation) is the only portion of VanDelft's sentence affected by his current petition. *Id.* at 8.

¶ 15 The trial court imposed an exceptional consecutive sentence pursuant to (1)(a) for count 1 based on its conclusion that concurrent sentencing would "fail to hold [VanDelft] accountable for all of the crimes for which he was convicted." Findings of Fact and Conclusions of Law at 2. VanDelft's offender score was at least 15 based on his criminal history and the multiple current offenses, but the maximum offender score accounted for on the sentencing grid was 9. Report of Proceedings at 409; RCW 9.94A.510. As a result, VanDelft would receive no additional punishment for count 1 if it were served concurrently to the others. The trial judge concluded that concurrent sentencing for count 1 was therefore "clearly too lenient." Findings of Fact and Conclusions of Law at 3.

¶ 16 In *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely,* the Court explained that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely,* 542 U.S. at 303. In other words, the "statutory maximum" is the maximum that a judge may impose "*without* any additional findings." *Id.* at 304.

¶ 17 In *Cubias,* this court discussed the impact of *Apprendi* and *Blakely* on consecutive sentencing determinations made pursuant to (1)(b). 155 Wn.2d at 550. In that

case, the jury found Cubias guilty of three counts of attempted murder in the first degree. *Id.* Because the three counts were charged based on three different victims, the trial court imposed consecutive sentences for each count pursuant to (1)(b), which presumes consecutive sentences for serious violent offenses so long as the charges arose out of "'separate and distinct criminal conduct.'" *Id.* (quoting (1)(b)). Cubias argued the imposition of consecutive sentences in his case violated *Apprendi* and *Blakely* because the trial judge, not the jury, found that the three counts of attempted murder constituted separate and distinct criminal conduct. *Id.* at 550-51. We held that the principle set forth in *Apprendi* and *Blakely* did not apply and upheld the sentences imposed by the trial court. *Id.* at 551.

¶ 18 We explained that "in both *Blakely* and *Apprendi,* the United States Supreme Court was directing its attention to the sentence on a *single* count of a multiple-count charge." *Id.* at 553. Because the *Apprendi* Court contemplated only whether the sentence for a single count exceeded the statutory maximum, we reasoned that "*Apprendi* does not have any application to consecutive sentences; to conclude otherwise would extend *Apprendi's* holding beyond the narrow grounds upon which it rested." *Id.* at 554. We similarly reasoned that the *Blakely* Court was not concerned with consecutive sentences. *Id.* (citing *Blakely,* 542 U.S. at 299 n. 2). Even so, we also emphasized that Cubias had no entitlement under (1)(b) to serve concurrent sentences for multiple serious violent offenses. *Id.* at 554-55. Furthermore, in discussing a similar Court of Appeals case, we noted that the imposition of consecutive sentences under (1)(b) does not operate to elevate crimes to the equivalent of a greater offense. *Cubias,* 155

Wn.2d at 555 (discussing *State v. Kinney,* 125 Wn.App. 778, 106 P.3d 274 (2005)). We concluded that a trial court's imposition of consecutive sentences under (1)(b) "does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of . . . *Apprendi* and *Blakely.*" *Id.* at 556.

¶ 19 Then, in *State v. Louis,* 155 Wn.2d 563, 572, 120 P.3d 936 (2005), the companion case to *Cubias* and another (1)(b) case, we reiterated:

> the principle set forth in *Apprendi* and *Blakely* has no application to consecutive sentencing decisions so long as each individual sentence remains within the statutory maximum for that particular offense.

¶ 20 VanDelft argues that the *Cubias* rule should not apply to charges sentenced under (1)(a) because (1)(a) presumes sentences will be served concurrently and the presumption can be overcome only by a finding of an aggravating factor under RCW 9.94A.535. VanDelft is correct that the operative distinction between (1)(a) and (1)(b) is that under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not. In *Cubias* we emphasized that "[a] defendant has no right to serve concurrent sentences for committing multiple serious violent offenses [under (1)(b)]," but here VanDelft did enjoy a presumption of a concurrent sentence for count 1. 155 Wash.2d at 555. Indeed, the *Blakely* Court spoke in terms of the sentencing limits which a defendant is entitled to expect based on the jury verdict. *See Blakely,* 542 U.S. at 309. Unlike *Cubias,* the facts found by the trial judge in this case went beyond the jury verdict and changed the nature of the sentence that the defendant was

entitled to expect for count 1 from concurrent to consecutive. The trial judge's findings operated to elevate the punishment for a nonserious violent offense to the realm of punishment for serious violent offenses based on facts not reflected in the jury's verdict. *See Blakely,* 542 U.S. at 303; *Apprendi,* 530 U.S. at 494; *Kinney,* 125 Wn.App. at 783.

¶ 21 More importantly, there is no dispute that the legislature has characterized consecutive sentences imposed under (1)(a) as exceptional, requiring a finding of an aggravating factor for support. RCW 9.94A.535. In fact, in order to overcome the presumption of concurrent sentencing in (1)(a), the sentencing judge in this case employed the very exceptional sentencing scheme at issue in *Blakely. Blakely,* 542 U.S. at 299; RCW 9.94A.535. Moreover, there is no dispute that in *State v. Hughes,* 154 Wn.2d 118, 140, 110 P.3d 192 (2005), we held "[t]he conclusion that allowing a current offense to go unpunished is clearly too lenient is a factual determination that *cannot* be made by the trial court following *Blakely.*"

¶ 22 Given (1)(a)'s presumption of concurrent offenses and the exceptional nature of a consecutive sentence imposed for a nonserious violent felony, we conclude that the rule announced in *Cubias* applies only to consecutive sentences imposed under (1)(b). We hold that because (1)(a) requires the trial court to look to the exceptional sentencing scheme in RCW 9.94A.535 in order to impose a consecutive sentence for a nonserious violent felony, *Blakely* and *Hughes* squarely apply to consecutive sentencing decisions under (1)(a). Here the trial judge found that a concurrent sentence for count 1 would be clearly too lenient, a fact not reflected in the jury verdict, in violation of *Blakely* and *Hughes.* We reverse the Court of Appeals, grant the petition, and remand to the trial court for

resentencing of count 1 concurrent with the other counts. *See Hughes,* 154 Wn.2d at 156 (remanding for resentencing within the standard range).[5]

III

Conclusion

¶ 23 Because VanDelft's appeal was still pending and not yet final when *Blakely* was decided, his petition asserting a *Blakely* violation was improperly dismissed by the Court of Appeals. His petition is not successive. The trial court here imposed an exceptional sentence when it ordered VanDelft's sentence for count 1 to be served consecutively, and thus *Cubias* is inapplicable. The exceptional consecutive sentence for count 1 was based on facts found by the trial judge and not reflected in the jury verdict, in violation of *Blakely* and *Hughes.* We reverse the Court of Appeals, grant the petition, and remand for resentencing of count 1.

WE CONCUR: Justices TOM CHAMBERS, CHARLES W. JOHNSON, SUSAN OWENS, BARBARA A. MADSEN, MARY E. FAIRHURST and RICHARD B. SANDERS.

ALEXANDER, C.J. (dissenting).

¶ 24 The majority holds that the "*Cubias* rule" should not apply in this case. *See State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005). In reaching its decision, it observes,

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[5] The United States Supreme Court recently held that *Blakely* error can be subject to harmless error analysis. *Washington v. Recuenco,* 548 U.S. ___, 126 S.Ct. 2546, 2553, 165 L.Ed.2d 466 (2006). However, because the State has never argued harmless error in this case, we decline to address that issue here.

"[William] VanDelft is correct that the operative distinction between [RCW 9.94A.589] (1)(a) and (1)(b) is that under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not." Majority at 12. Because I am unable to find an "operative distinction" between RCW 9.94A.589(1)(a) and (1)(b), I see no reason why our decision in *Cubias* does not control our review of VanDelft's sentence. Accordingly, I dissent.

¶ 25 In *Cubias,* we held that a trial court could impose consecutive sentences without a separate finding by a jury as to whether each count was separate and distinct. Majority at 10 (citing *Cubias,* 155 Wn.2d at 550). In affirming Cubias's sentence, we held that both *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) did not have any application to consecutive sentences. *Cubias,* 155 Wn.2d at 554. As the majority correctly observes, the imposition of consecutive sentences " 'does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of . . . *Apprendi* and *Blakely.*' " Majority at 11 (quoting *Cubias,* 155 Wn.2d at 556).

¶ 26 In *Cubias,* we held that when a trial judge imposes consecutive sentences under (1)(b), he or she does not run afoul of *Blakely.* Here, we are faced with the question of whether a trial judge may impose consecutive sentences instead of a concurrent sentence under (1)(a). Thus, any departure from *Cubias* to invoke *Blakely* for sentences issued under (1)(a) depends upon finding a substantial difference between (1)(a) and (1)(b).

¶ 27 I am unable to find any difference between (1)(a) and (1)(b) that surmounts their similarities. The majority finds such a difference, indicating that "under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not." Majority at 12. It derives this presumption from the language of the two subsections. Concurrent sentences are "presumed" under (1)(a) because that provision says that consecutive sentences "may" be imposed, while concurrent sentences are *not* "presumed" under (1)(b) because that provision says that consecutive sentences "shall" be imposed.

¶ 28 For the majority, the difference between the two subsections, distilled to its essence, is a presumption of concurrent sentencing. Where the statute has a presumption of concurrent sentences under (1)(a), imposing consecutive sentences triggers *Blakely*. But, where the statute is *without* a presumption of concurrent sentencing under (1)(b), that is, where it allows for either a concurrent or consecutive sentence, imposing consecutive sentences does *not* trigger *Blakely*.

¶ 29 The flaw in the majority's reasoning is that our decision in *Cubias* did not turn upon what presumptions were found in (1)(b). It was not a critical factor. As noted above, *Cubias* turned upon a narrow reading of *Blakely*. There, we affirmed the imposition of consecutive sentences because *Blakely* gave instructions as to the range of only *individual* sentences. As the majority noted, we said in *Cubias* that "'in both *Blakely* and *Apprendi,* the United States Supreme Court was directing its attention to the sentence on a *single* count of a multiple-count charge.'" Majority at 11 (quoting *Cubias,* 155 Wn.2d at 553).

¶ 30 I fail to understand how the presence of a presumption for concurrent sentences somehow reverses the analysis we used in *Cubias*. This point is underscored by the dissent in *Cubias*. In it, Justice Madsen took specific issue with our emphasis on the singular nature of the sentences involved in *Blakely* and *Apprendi*. *See Cubias*, 155 Wn.2d. at 558 (Madsen, J., dissenting) ("For Sixth Amendment purposes, there is no difference between an exceptional sentence that increases the length of a sentence for one count beyond the presumptive range and an exceptional *consecutive* sentence that increases the presumptive length of incarceration."). Her argument demonstrates the axis upon which *Cubias* turned: whether *Blakely* applies is determined by examining each sentence in isolation – not by examining an amalgamation of those sentences. Because *Cubias* did not turn upon the lack of a presumption of concurrent sentences, I fail to see how our analysis in it is reversed by the presence of such a presumption. I respectfully dissent.

Justice JAMES M. JOHNSON, concurs.

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No. 05-9222

In the Supreme Court of the United States

LONNIE LEE BURTON, PETITIONER

v.

DOUG WADDINGTON, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether *Blakely* v. *Washington*, 542 U.S. 296 (2004), which held that facts, other than a prior conviction, supporting a sentence above the standard sentencing range in a legislatively prescribed sentencing guidelines system must be found by a jury and proved beyond a reasonable doubt, announced a new rule.

2. If *Blakely* announced a new rule, whether its requirement of proof beyond a reasonable doubt applies retroactively on collateral review.

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In the Supreme Court of the United States

No. 05-9222

LONNIE LEE BURTON, PETITIONER

v.

DOUG WADDINGTON, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Blakely v. *Washington*, 542 U.S. 296 (2004), held that facts, other than a prior conviction, supporting a sentence above the standard sentencing range in a legislatively prescribed sentencing guidelines system must be found be a jury and proved beyond a reasonable doubt. This case addresses whether *Blakely* is retroactive on collateral review. Although this Court extended the *Blakely* rule to the federal Sentencing Guidelines in *United States* v. *Booker*, 543 U.S. 220 (2005), the retroactivity of *Booker* presents distinct issues because of *Booker*'s remedial holding. See, *e.g.*, *McReynolds* v. *United States*, 397 F.3d 479, 481 (7th Cir.), cert. denied, 545 U.S. 1110 (2005). Nevertheless, the questions presented in this case require the Court to consider more generally the standards governing the availability of new rules on collateral review. The United States therefore has a substantial interest in this case.

STATEMENT

1. On October 18, 1991, petitioner followed a 15-year-old boy home from school. Petitioner forced his way into the boy's house at gunpoint and raped him both orally and anally. After the rape, petitioner told the boy not to move for 15 minutes or petitioner would shoot him. Petitioner then stole $160 and left the house. When the boy's father returned home, the boy was lying motionless, frightened that petitioner might still be in the house. In 1994, a jury found petitioner guilty of rape, robbery, and burglary. J.A. 23, 27, 44-45.

At that time, Washington's sentencing guidelines provided that sentences for multiple offenses "shall be served concurrently," and "[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of" the Revised Code of Washington, Sections 9.94A.120 and 9.94A.390. Wash. Rev. Code § 9.94A.400.[1] Section 9.94A.120(2) stated that the "court may impose a sentence outside the standard range for [the] offense if its finds * * * that there are substantial and compelling reasons justifying an exceptional sentence." *Id.* § 9.94A.120(2). The statute provided a non-exhaustive list of "illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence," including that the "operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." *Id.* § 9.94A.390(2)(i).

The standard sentencing ranges were 234 to 304 months for petitioner's rape conviction, 153 to 195 months for his robbery conviction, and 105 to 134 months for his burglary conviction. J.A. 26. On March 16, 1998, the trial court sentenced petitioner to 304 months for the rape, 153 months for the robbery, and 105 months for the burglary. The court ordered the

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[1] Citations to the Revised Code of Washington are to the version in existence at the time of petitioner's sentencing in 1998.

three sentences to run consecutively for a total sentence of 562 months. J.A. 9. The court relied on three factors in imposing consecutive sentences, including that petitioner's "long criminal history, combined with the 'multiple offense policy,' results in a sentence that is clearly too lenient." J.A. 29-31. The court found that each factor, "standing alone, is a substantial and compelling reason and justification for imposing an exceptional sentence." J.A. 30-31.[2]

The Washington Court of Appeals affirmed. J.A. 43-54. The appeals court held that the trial court did not err in running petitioner's sentences consecutively because "the multiple offense policy justifies the exceptional sentence." J.A. 51. The Washington Supreme Court denied review. J.A. 55.

2. In January 2002, petitioner filed a federal habeas petition claiming that his sentence violated due process because the facts supporting imposition of consecutive sentences were not submitted to a jury and proved beyond a reasonable doubt. J.A. 61. He relied on *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), which held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be proved to a jury beyond a reasonable doubt, and on *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002), which applied *Apprendi*'s rule to hold that an aggravating factor that is statutorily necessary for imposition of the death penalty must be found by a jury. See J.A. 75.

A magistrate judge recommended that the petition be denied. J.A. 56-76. He concluded that petitioner's sentence did not violate *Apprendi* or *Ring* because petitioner "received an aggregate 562-month sentence for all three" offenses, and his sentence for each offense did not exceed the standard sentencing range for the offense. J.A. 76. The district court

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[2] Petitioner had been sentenced in 1994 and then resentenced in 1996 after a prior conviction was reversed. The Washington Court of Appeals had reversed that sentence on grounds that are not relevant here and remanded for resentencing. J.A. 45.

adopted the magistrate judge's report and recommendation and denied the habeas petition. J.A. 77. Petitioner appealed.

While the appeal was pending, this Court decided *Blakely* v. *Washington*, 542 U.S. 296 (2004). *Blakely* extended the rule of *Apprendi* to Washington's sentencing guidelines system. The Court held unconstitutional an exceptional sentence imposed under the Washington guidelines because the facts supporting the sentence, which was above the standard sentencing range for the defendant's offense, had not been proved to a jury beyond a reasonable doubt. *Id.* at 303-305.

The court of appeals affirmed the denial of the habeas petition. J.A. 78-82. On the merits of petitioner's challenge to his exceptional sentence, the court held that he could not rely on *Blakely* because it "established a new rule that does not apply retroactively on collateral review." J.A. 81. Although petitioner could rely on *Apprendi*, which was decided before his convictions and sentence became final, the court held that there was no *Apprendi* violation because "the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum." *Ibid.*

SUMMARY OF ARGUMENT

Under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989) (plurality opinion), new constitutional rules of criminal procedure do not apply retroactively on collateral review unless they are "watershed" rules. Because *Blakely* v. *Washington*, 542 U.S. 296 (2004), announced a new rule of procedure that is not a "watershed" rule, it does not apply retroactively.

A. A rule is "new" unless it was so dictated by precedent that no reasonable jurist could have declined to adopt it. Petitioner contends that *Blakely* was dictated by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the "statutory maximum" must be proved to a jury beyond a reasonable doubt. Petitioner is incorrect.

Blakely extended *Apprendi* to facts supporting a sentence above the standard sentencing range in a legislatively prescribed sentencing guidelines system. In so doing, *Blakely* defined "statutory maximum" in a way that was not dictated either by the most straightforward reading of that phrase or by *Apprendi*. The sentence in *Blakely* was below the maximum penalty specified in the Revised Code of Washington for the defendant's offense, even though it was above the standard sentencing range established by the State's statutory guidelines system. Thus, the sentence in *Blakely* was invalid only if the top of the standard range was the "statutory maximum." *Apprendi*, which did not involve a guidelines system, did not decide that question. A reasonable jurist could have concluded—as many did—that, in a guidelines system, the "statutory maximum" is the maximum penalty specified by statute for the offense rather than the top of the guidelines range. Indeed, among the federal and state appeals courts that had considered the issue, *all but one* had held that *Apprendi* did not restrict guidelines systems.

Two other features of the Washington sentencing system also would have permitted reasonable jurists to reach a different result in *Blakely*. First, the legislature did not specify the exclusive set of facts authorizing a sentence above the standard range. Instead, the sentencing judge could impose an exceptional sentence based on a wide range of facts of his own choosing. Second, factual findings alone did not authorize the higher punishment. The judge also had to make a qualitative judgment that those findings provided "substantial and compelling reasons" for an exceptional sentence. The judge thus effectively had discretion to decide both what facts might support a higher sentence and whether the facts actually justified such a sentence. In that respect, a reasonable jurist could analogize the Washington system to traditional, indeterminate sentencing systems, under which judges may find facts by a preponderance of the evidence without violating the Constitution. A reasonable jurist therefore could have con-

cluded that the Washington guidelines system did not violate the Constitution.

B. *Blakely*'s requirement of proof beyond a reasonable doubt for facts supporting a sentence above the standard range in a statutory guidelines system is not a "watershed" rule. A rule is "watershed" only if (1) it alters our understanding of the bedrock procedural elements essential to a fair trial and (2) infringement of the rule so seriously diminishes accuracy that it creates an impermissibly large risk of injustice. *Blakely*'s reasonable doubt rule satisfies neither requirement.

1. *Blakely* did not alter our understanding of the bedrock elements essential to a fair trial. *Blakely* has nowhere near the fundamental and sweeping importance of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the only rule that this Court has identified as "watershed." *Gideon* announced the core right to counsel for every felony defendant. *Blakely*, in contrast, did not announce the core rule that the elements of a crime must be proved beyond a reasonable doubt; nor did it announce that the reasonable doubt requirement sometimes applies to penalty enhancing facts that are not formal offense elements. *Blakely* merely clarified that the reasonable doubt requirement applies to a certain category of penalty enhancing facts. Moreover, unlike *Gideon*, which pervasively affects the fairness of every aspect of a trial, *Blakely* applies only to those defendants who have already been found guilty of an offense. It applies only in jurisdictions that use a mandatory guidelines system and, even then, only to defendants whose punishment is increased beyond the standard sentencing range by the finding of an aggravating fact. It is therefore no surprise that this Court has concluded that *Blakely* error does not require automatic reversal on direct review because it "does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Washington* v. *Recuenco*, 126 S. Ct. 2546, 2551 (2006) (citation and emphasis omitted).

Another indication that *Blakely* is not as essential to fundamental fairness as *Gideon* is that many facts with as much or more impact on punishment as facts covered by *Blakely* may constitutionally be established by a preponderance of the evidence. Those include facts that increase a sentence within the statutory range, facts that trigger a statutory mandatory minimum, and even facts that support a sentence above the standard range in an *advisory* guidelines system. They also include facts that determine guilt or innocence if the legislature has declared those facts to be defenses rather than elements. These examples demonstrate that the reason for the *Apprendi* and *Blakely* rules is not that no system of justice can tolerate the use of the preponderance standard to find facts with a significant impact on punishment. That happens frequently. And, even without the *Blakely* rule, no defendant faces any punishment at all unless the government has proved the elements of a criminal offense beyond a reasonable doubt. Once that has occurred, it does not offend *bedrock* notions of fairness to find facts that bear on the extent of punishment by a preponderance of the evidence.

2. In addition, infringement of the *Blakely* rule does not so seriously diminish accuracy that it creates an impermissibly large risk of injustice. The preponderance of the evidence standard is a reliable method for finding facts. It is considered sufficiently accurate for many important determinations in criminal cases—including whether a defendant's confession was voluntary, whether he validly waived his Miranda rights, and whether he voluntarily consented to a search. The reliability of the preponderance standard in determining facts that bear on punishment is particularly well established. The preponderance standard is the ordinary standard of proof for finding facts in traditional, indeterminate sentencing systems—even though those facts can have a substantial impact on the defendant's punishment. It is difficult to conceive how it could be constitutional to find those facts by the preponderance standard if using that standard to

find penalty enhancing facts created the serious risk of inaccuracy required by the "watershed" exception.

ARGUMENT

BLAKELY v. *WASHINGTON* DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW

In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Id.* at 490. In *Blakely* v. *Washington*, 542 U.S. 296 (2004), the Court held that the jury trial and reasonable doubt requirements also apply to facts that support a sentence above the standard sentencing range in a legislatively prescribed guidelines system. The questions presented are whether *Blakely* announced a new rule and, if so, whether its requirement of proof beyond a reasonable doubt applies retroactively on collateral review.[3]

Under *Teague* v. *Lane*, 489 U.S. 288, 311 (1989) (plurality opinion), new constitutional rules of criminal procedure generally do not apply retroactively on collateral review. That general bar against retroactivity recognizes that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal jus-

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[3] *Schriro* v. *Summerlin*, 542 U.S. 348 (2004), already makes clear that, if *Blakely* is a new rule, its *jury trial* requirement is not retroactive on collateral review. *Summerlin* held that *Ring* v. *Arizona*, 536 U.S. 584 (2002), which extended *Apprendi*'s jury trial requirement to the aggravating circumstances that make a defendant eligible for the death penalty, is not retroactive because deprivation of the jury trial right does not seriously diminish the accuracy of a criminal proceeding. *Summerlin*'s reasoning about the jury trial right in *Ring* applies with equal force to the jury trial right in *Blakely*. Therefore, as petitioner acknowledges in his questions presented, if *Blakely* is a new rule, only the retroactivity of its reasonable doubt requirement is at issue. See Pet. Br. i (second question).

tice system." *Id.* at 309. *Teague*'s bar against retroactivity is therefore subject to only a narrow exception for "a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) (internal quotation marks and citations omitted).[4] Because *Blakely* is a new rule, and its requirement that facts supporting an upward departure from a statutory sentencing guidelines range must be proved beyond a reasonable doubt is not a "watershed rule of criminal procedure," *Blakely* does not apply retroactively on collateral review.[5]

A. *Blakely* Announced A New Rule

Teague's bar on retroactive application of new rules seeks "to ensure that gradual developments in the law over which

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[4] Although the Court has sometimes identified another exception to the *Teague* bar for rules that place conduct or persons beyond the reach of the State's power to punish, the Court has more recently stated that such rules "are more accurately characterized as substantive rules not subject to the bar." *Summerlin*, 542 U.S. at 352 n.4. Petitioner does not contend that *Blakely* established a substantive rule, and for good reason. A rule is substantive only "if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. *Blakely* did not prohibit States from punishing any particular conduct or persons. It only held that, if a State conditions punishment above a statutorily mandated guidelines range on the existence of aggravating facts, those facts must be proved to a jury beyond a reasonable doubt. Thus, *Blakely* merely "altered the range of permissible methods for determining * * * essential facts bearing on punishment," and it is a procedural rule. *Ibid.*

[5] Every federal court of appeals and state court of last resort that has addressed the issue has reached that conclusion. See *United States* v. *Hernandez*, 436 F.3d 851, 855 (8th Cir.), cert. denied, 126 S. Ct. 2341 (2006); *Michael* v. *Crosby*, 430 F.3d 1310 (11th Cir. 2005), cert. denied, 126 S. Ct. 2025 (2006); *Schardt* v. *Payne*, 414 F.3d 1025, 1034-1036 (9th Cir. 2005), petition for cert. pending, No. 05-9237 (filed Nov. 10, 2005); *Cirilo-Muñoz* v. *United States*, 404 F.3d 527, 532-533 (1st Cir. 2005); *United States* v. *Price*, 400 F.3d 844, 846-849 (10th Cir. 2005); *People* v. *Johnson*, No. 05SC408, 2006 WL 2589170 (Colo. Sept. 11, 2006) (holding *Blakely* not retroactive on state habeas using *Teague* analysis); *State* v. *Evans*, 114 P.3d 627, 632-633 (Wash. 2005) (same); *State* v. *Houston*, 702 N.W.2d 268, 273 (Minn. 2005) (same).

reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990). That purpose is reflected in the standard for determining whether a decision announces a new rule: A rule is "new" unless it was so "*dictated*" by precedent in effect when the defendant's conviction became final that it "was apparent to all reasonable jurists." *Beard* v. *Banks*, 542 U.S. 406, 413 (2004) (citation omitted). The question is whether a "reasonable jurist * * * could have reached a conclusion different from the one" this Court ultimately announced. *Lambrix* v. *Singletary*, 520 U.S. 518, 532 (1997). In other words, a rule is new unless a state or lower federal court "would have acted objectively unreasonably" in declining to adopt it. *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997).

Petitioner contends (Br. 12-26) that *Blakely* is not a new rule because it was compelled by *Apprendi*, which was decided before his convictions became final. Contrary to that contention, *Blakely* was not compelled by *Apprendi*, much less "*dictated*" by *Apprendi* to the extent that "*no other* interpretation was reasonable." *Lambrix*, 520 U.S. at 538.

1. *Blakely* extended *Apprendi* to facts supporting a sentence above the standard sentencing range in a legislatively prescribed guidelines system. In so doing, *Blakely* defined "statutory maximum" for *Apprendi* purposes in an innovative way that was not dictated by *Apprendi* itself.

In *Apprendi*, the defendant had been convicted of possession of a firearm for an unlawful purpose, an offense for which New Jersey law prescribed a maximum penalty of 10 years in prison. He was sentenced to 12 years in prison, however, because a separate statute increased the authorized punishment if the sentencing judge found, by a preponderance of the evidence, that the defendant acted with a purpose to intimidate an individual because of race. This Court concluded that the enhanced sentence violated the defendant's rights under the Sixth Amendment and the Due Process Clause. The

Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

In *Blakely*, the defendant pleaded guilty to kidnapping, a felony for which Washington law prescribed a maximum prison term of 10 years. Washington's legislatively enacted sentencing guidelines, however, required a standard sentence of between 49 and 53 months in prison, unless the sentencing judge found aggravating circumstances that justified an exceptional sentence. The sentencing judge found, by a preponderance of the evidence, that the defendant had acted with deliberate cruelty, and the judge concluded that an exceptional sentence of 90 months in prison was therefore justified. This Court held that the enhanced sentence violated the rule enunciated in *Apprendi*, because the top of the standard sentencing range, rather than the ultimate statutory cap of 10 years, qualified as the "statutory maximum" for purposes of the *Apprendi* rule. 542 U.S. at 303-304.

The sentence in *Apprendi* exceeded the 10-year maximum prescribed by New Jersey statute for the defendant's offense. In contrast, the sentence in *Blakely* was below the 10-year maximum specified in the Revised Code of Washington for the defendant's offense, even though it was above the standard sentencing range established by the State's statutory guidelines system. Thus, the sentence in *Blakely* was subject to the *Apprendi* rule only if the top of that standard sentencing range, rather than the ultimate statutory limit, was the "statutory maximum" for purposes of the rule. *Apprendi* had not decided whether the top of a standard sentencing range that is lower than the maximum penalty otherwise prescribed by statute for the offense qualifies as the "statutory maximum." *Apprendi* did not involve a sentencing guidelines system, and the Court therefore had no occasion to consider whether or how its rule would apply in that situation.

Petitioner incorrectly asserts that *Apprendi* defined "statutory maximum" as the maximum sentence a defendant could receive "*if punished according to the facts reflected in the jury verdict alone.*" Pet. Br. 18 (quoting *Apprendi*, 530 U.S. at 483). To be sure, the *Apprendi* opinion included the language quoted by petitioner, and, in *Blakely*, this Court relied in part on that language to support its holding. See 542 U.S. at 303. But the Court in *Apprendi* did not use the quoted language in defining (or even in discussing) the term "statutory maximum." See 530 U.S. at 483, 494. In fact, the Court did not define "statutory maximum" at all. The Court had no occasion to do so because there was no dispute in *Apprendi* that the sentence exceeded the 10-year statutory maximum. "It was not until *Blakely* that [the Court] clarified that 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*'" *United States* v. *Price*, 400 F.3d 844, 847 (10th Cir. 2005) (quoting *Blakely*, 542 U.S. at 303)); see *Simpson* v. *United States*, 376 F.3d 679, 681 (7th Cir. 2004) ("*Blakely* * * * alter[ed] courts' understanding of 'statutory maximum.'").

Given the limited guidance in the *Apprendi* opinion on the meaning of "statutory maximum," a state or lower federal court applying *Apprendi* to a guidelines system could reasonably have concluded—as those courts did almost universally conclude (see p. 15, *infra*)—that the "statutory maximum" was the maximum penalty specified by statute for the offense rather than the top of the guidelines range. And, under that interpretation, facts supporting upward departures from the guidelines range would not have had to be proved to a jury beyond a reasonable doubt. Indeed, Justice O'Connor, joined by the other three dissenting Justices in *Apprendi*, suggested just such an interpretation of the *Apprendi* decision. She noted that, "under one reading" of the Court's opinion, "[a] State could * * * remove from the jury (and subject to a standard of proof below 'beyond a reasonable doubt') the as-

sessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced." 530 U.S. at 540 (dissenting opinion). The Court's response was not that her proposed interpretation was foreclosed by *Apprendi*. Instead, the Court argued that use of that kind of sentencing system would be constrained by political considerations and by precedent other than *Apprendi*. See *id.* at 490 n.16 (majority opinion).

The reading of *Apprendi* that Justice O'Connor proposed was supported by the *Apprendi* Court's claim that its decision was consistent with *Walton* v. *Arizona*, 497 U.S. 639 (1990). *Walton* had upheld Arizona's death penalty system, which required, after a jury found a defendant guilty of first-degree murder, that a judge find additional aggravating factors before imposing a death sentence. See 530 U.S. at 541 (dissenting opinion). The *Apprendi* majority asserted that the Arizona system was consistent with *Apprendi* because Arizona's first-degree murder statute specified death as the maximum penalty. See *id.* at 497. But, as Justice O'Connor noted, *id.* at 541 (dissenting opinion)—and the Court later acknowledged when overruling *Walton* in *Ring* v. *Arizona*, 536 U.S. 584, 604 (2002)—other provisions of Arizona law made clear that life imprisonment was the most serious penalty that could be imposed unless the judge found additional facts. The *Apprendi* Court's refusal to overrule *Walton* thus supported a reading of *Apprendi* under which the "statutory maximum" was the highest penalty specified by statute for the offense, even when other provisions of law restricted the circumstances under which that penalty could be imposed.[6]

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[6] In ultimately holding that *Walton* was inconsistent with *Apprendi*, *Ring* provided some clarification of the meaning of "statutory maximum." But *Ring* still did not resolve the meaning of that term in the context of a sentencing guidelines system like Washington's, and *Blakely* was therefore not dictated by *Ring*. In any event, *Ring* had not been decided when petitioner's convictions and sentence became final, so he cannot rely on *Ring* in arguing that *Blakely* is not a new rule. See p. 10, *supra*.

If this Court had adopted the reading of *Apprendi* that Justice O'Connor identified as a possible interpretation, the Court would have not have reached the result it did in *Blakely*. It is therefore clear that reasonable jurists "could have reached a conclusion different from the one" that this Court announced in *Blakely*. *Lambrix*, 520 U.S. at 532.

2. Two other differences between the Washington sentencing guidelines system and the sentencing statutes in *Apprendi* also would have permitted reasonable jurists to reach a different result in *Blakely*.

In *Apprendi*, the increase in the statutory maximum depended on a fact specified by the legislature—that the defendant acted for the purpose of intimidation based on race. 530 U.S. at 468-469. Under the Washington system, in contrast, the legislature did not specify the exclusive set of facts authorizing a sentence above the standard range. Instead, a sentencing judge could impose an exceptional sentence based on a wide range of facts of his own choosing, so long as they provided "substantial and compelling reasons" for the enhanced sentence. Wash. Rev. Code §§ 9.94A.120, 9.94A.390.

The Washington system also differed from the one in *Apprendi* in another significant way. In *Apprendi*, the factual finding was itself sufficient to authorize the enhanced sentence. 530 U.S. at 468-469. Under the Washington system, in contrast, factual findings alone did not authorize the higher punishment. The judge had to make an additional, qualitative judgment that the factual findings provided "substantial and compelling reasons" for an exceptional sentence. Wash. Rev. Code § 9.94A.120(2). The judge was not required to reach that conclusion even if he found an aggravating circumstance specifically identified by the legislature. See U.S. Amicus Br. at 19-20, *Blakely*, *supra* (No. 02-1632) (citing cases).

Because of these features of the Washington system, a sentencing judge effectively had discretion to decide both what facts might support a higher sentence and whether those facts actually justified such a sentence. In that respect, the

Washington system resembled traditional, indeterminate sentencing systems, under which judges may find facts by a preponderance of the evidence without violating the Constitution. See U.S. Amicus Br. at 7-8, 15-22, *Blakely*, *supra* (No. 02-1632). A reasonable jurist therefore could have concluded that the Washington guidelines did not violate *Apprendi*.

3. Not only could reasonable jurists have concluded that *Apprendi* did not dictate the invalidation of sentencing guidelines systems, but the vast majority of state and federal courts reached just that conclusion. See *Blakely*, 542 U.S. at 320 n.1 (dissenting opinion) (citing cases). Before *Blakely*, only one appeals court had applied *Apprendi* to invalidate a guidelines scheme. See *ibid.* In contrast, numerous state appellate courts had held that *Apprendi* did not restrict state sentencing guidelines.[7] And every federal court of appeals had held that *Apprendi* did not apply to sentences under the federal Sentencing Guidelines that were within the maximum for the offense specified by statute. See 542 U.S. at 320 n.1 (dissenting opinion) (citing cases). In light of the virtually unanimous rejection of the *Blakely* rule by the state and lower federal courts, it is difficult to conclude that the rule should have been "apparent to all reasonable jurists." *Banks*, 542 U.S. at 413 (citation omitted).

Moreover, *Blakely* was a close decision that generated four dissenting votes. The existence of those dissents also suggests that "reasonable jurists could have differed as to whether" *Apprendi* compelled *Blakely*. *Banks*, 542 U.S. at 414-415; *O'Dell*, 521 U.S. at 159-160. Noting that the *Blakely*

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[7] See, *e.g.*, *State* v. *Dilts*, 82 P.3d 593, 599 (Or. 2003), vacated, 542 U.S. 934 (2004); *State* v. *Gore*, 21 P.3d 262, 276-277 (Wash. 2001), overrruled by *State* v. *Hughes*, 110 P.3d 192 (Wash. 2005); *State* v. *Shattuck*, No. C6-03-361, 2004 WL 772220, at *6 (Minn. Ct. App. Apr. 13, 2004), rev'd, 704 N.W.2d 131 (Minn. 2005); *State* v. *Brown*, 70 P.3d 454, 461-462 (Ariz. Ct. App. 2003); *People* v. *Allen*, 78 P.3d 751, 755 (Colo. Ct. App. 2001); *McCloud* v. *State*, 803 So. 2d 821, 827 (Fla. Dist. Ct. App. 2001); *State* v. *Huntley*, No. 02CA15, 2002 WL 31769238 (Ohio Ct. App. Dec. 9, 2002).

dissenters criticized *Apprendi* itself, petitioner argues (Br. 20-21) that they must have accepted that *Apprendi* compelled *Blakely*. On the contrary, the dissenters argued that *Apprendi* did not require the result in *Blakely*. Writing for all four dissenters, Justice O'Connor repeatedly criticized the Court's "extension of *Apprendi*" to sentencing guidelines systems. 542 U.S. at 314, 318, 320 n.1. She argued that the Washington guidelines "did not alter the statutory maximum sentence to which [Blakely] was exposed," *id.* at 320, and were "as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be," *id.* at 325. Justice Breyer, joined by Justice O'Connor, also lamented that, "[u]ntil now, [he] would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts." *Id.* at 346.

4. Petitioner observes that this Court said in *Blakely* that it was "apply[ing]" *Apprendi*. Pet. Br. 19 (quoting 542 U.S. at 301). And he contends (Br. 12-17) that the application of a rule announced in a previous decision cannot constitute a new rule. That is incorrect. *Teague*'s bar on retroactivity retains its full force when a "prior decision is applied in a novel setting thereby extending the precedent." *Stringer* v. *Black*, 503 U.S. 222, 228 (1992). That is precisely what occurred in *Blakely*. Applying *Apprendi* in the novel setting of statutory sentencing guidelines, *Blakely* extended *Apprendi* to cover facts supporting a sentence above the standard sentencing range, even when the sentence is below the maximum penalty otherwise identified by statute for the crime of conviction.

The cases that petitioner cites (Br. 13-17) establish only that applying a prior decision to govern a "closely analogous" case does not create a new rule when the result is "*dictated*" by the prior decision. *Penry* v. *Lynaugh*, 492 U.S. 302, 314 (1989) (citation omitted). See *id.* at 319 (concluding that the *Penry* rule was "dictated" by precedent); *Stringer*, 503 U.S. at 229 (concluding that it would not create a new rule to apply *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), to Mississippi's capi-

tal sentencing system because that result followed "*a fortiori*" from *Godfrey*). Those cases do not assist petitioner because the result in *Blakely* did not follow *a fortiori* from *Apprendi*.[8]

Petitioner also points to language in *Blakely* and *United States* v. *Booker*, 543 U.S. 220 (2005), suggesting that the result in *Blakely* was "clear" and reflected "respect for long-standing precedent." Pet. Br. 19-20 (citations omitted). But, as this Court has repeatedly observed, courts "frequently" use language suggesting that their decisions are required by precedent "even when aware of reasonable contrary conclusions reached by other courts." *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990); see *O'Dell*, 521 U.S. at 161 n.2.[9]

B. *Blakely* Did Not Establish A Watershed Procedural Rule

Because *Blakely* established a new rule, its requirement of proof beyond a reasonable doubt for facts supporting an upward departure in a statutory guidelines system applies retroactively only if that requirement is a "watershed rule[] of criminal procedure." *Teague*, 489 U.S. at 311 (plurality opinion). That category "is extremely narrow," *Summerlin*,

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[8] Two of the cases cited by petitioner did not involve *Teague*'s new rule principle but instead involved statutory limits on habeas relief imposed by 28 U.S.C. 2254(d). See *Williams* v. *Taylor*, 529 U.S. 362 (2000); *Miller-El* v. *Dretke*, 545 U.S. 231 (2005). The final case on which petitioner relies, *Yates* v. *Aiken*, 484 U.S. 211 (1988), was decided before *Teague*.

[9] Even if *Blakely* had not announced a new rule, applying *Blakely* to grant relief to petitioner would announce one. The sentence for each of petitioner's offenses fell within the standard sentencing range for that offense. The sentence for each offense therefore did not exceed the "statutory maximum" for that offense as defined in *Blakely*. Petitioner contends that his *overall* sentence nonetheless violates *Blakely* because the trial court ordered the individual sentences to run consecutively based on its finding by a preponderance of the evidence that concurrent sentences would be "clearly too lenient." J.A. 29. Thus, to grant petitioner relief, a court would have to decide that the *Blakely* rule applies to findings that support the imposition of consecutive sentences on multiple offenses. Neither *Blakely* nor any other decision of this Court resolves that issue.

542 U.S. at 352, and "it is unlikely that any of these watershed rules ha[s] yet to emerge." *Tyler* v. *Cain*, 533 U.S. 656, 667 n.7 (2001) (internal quotation marks and citation omitted). *Blakely*'s reasonable doubt requirement is not a "watershed" rule.

To qualify for "watershed" status, a rule must "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990). A rule implicates fundamental fairness if it "'alter[s] our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (citation omitted). A rule implicates accuracy if its infringement "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 542 U.S. at 355-356 (internal quotation marks and citation omitted). The "watershed" exception does not apply unless both of those standards are satisfied. *Tyler*, 533 U.S. at 665. *Blakely*'s requirement of proof beyond a reasonable doubt satisfies neither standard.

1. Blakely did not announce a bedrock rule essential to a fair trial

a. To satisfy the first part of the test for "watershed" rules, a rule must make a "fundamental shift" in "our understanding of the bedrock procedural elements essential to fundamental fairness." *Banks*, 542 U.S. at 419-420 (internal quotation marks, citation, and emphasis omitted). This Court has identified only one rule that has had that dramatic effect: *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). See *Banks*, 542 U.S. at 417. Before *Gideon*, this Court had held that an indigent defendant charged with a felony offense could, in some cases, receive a fair trial without the option of assistance of appointed counsel. In *Gideon*, the Court repudiated that notion and held that, absent a waiver of counsel, a felony trial conducted without a defense lawyer is inherently unfair. *Gideon* thus altered our understanding of the procedures that are

indispensable to a fair trial by adding the right to appointed counsel to that core set of rules.

Rules that are "less sweeping and fundamental" than *Gideon* do not qualify as "watershed" rules. *Banks*, 542 U.S. at 418 (citation omitted). For example, in *Sawyer*, the Court considered the retroactivity of *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), which held that the Eighth Amendment bars imposition of a capital sentence when a prosecutor mistakenly informs the jury that responsibility for the death penalty rests elsewhere. Even though the *Caldwell* rule was a "systemic rule enhancing reliability," the Court concluded that it was not a "watershed" rule because it only "added to an existing guarantee of due process protection against fundamental unfairness." *Sawyer*, 497 U.S. at 244. Similarly, in *O'Dell*, the Court rejected "watershed" status for *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), which held that a capital defendant has a due process right to introduce evidence of his parole ineligibility to rebut a prosecutor's future dangerousness argument. The Court explained that, "[u]nlike the sweeping rule of *Gideon*," which established a broad right to counsel in all felony cases, the *Simmons* rule is a "narrow right" that applies only in "a limited class of capital cases." 521 U.S. at 167.

These cases establish that rules that apply or extend bedrock constitutional guarantees are not "watershed" unless they have the same "primacy and centrality" as *Gideon*. *Banks*, 542 U.S. at 420 (citation omitted). Thus, rules lack "watershed" status when they make only an "incremental change" in notions of fundamental fairness, or when they apply "narrowly" to a limited class of cases or defendants. *Id.* at 419-420. *Blakely* is just such a rule.

Blakely, like *Apprendi* before it, added a novel corollary to well established constitutional principles. The basic rule that the government must prove all elements of a criminal offense beyond a reasonable doubt was well settled even before *In re Winship*, 397 U.S. 358 (1970). Indeed, the reason-

able doubt rule "dates at least from our early years as a Nation." *Id.* at 361. This Court had also already made clear, before *Apprendi*, that facts that enhance punishment may sometimes be subject to the reasonable doubt requirement even if they are not formally designated as elements of the offense. See *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986) (suggesting that proof beyond a reasonable doubt would be required for a sentencing enhancement that amounted to "a tail which wags the dog of the substantive offense"). *Apprendi* determined that facts that enhance punishment beyond the statutory maximum are subject to the well-established reasonable doubt rule. And *Blakely* made an even more incremental change. As discussed above, *Blakely* simply extended the *Apprendi* rule to facts that are necessary to authorize a sentence within the maximum for the offense but above a legislatively prescribed sentencing guidelines range. Line-drawing decisions like *Blakely* may be of substantial importance and have significant practical impact, but they are not the kind of "groundbreaking" decisions, comparable to *Gideon*, that qualify as "watershed" rules. *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994).

Nor does the *Blakely* rule have the sweep and importance of a bedrock rule. *Gideon*'s rule against complete denial of counsel applies to every felony trial and affects every stage of the trial and every defendant. The *Blakely* rule, by contrast, does not even apply to the determination whether a defendant is guilty of a crime established by the legislature. Rather, it affects the procedure for determining punishment. Thus, the *Blakely* rule applies only to those defendants who have already been found guilty of an offense. In addition, the rule applies only in jurisdictions that have a guidelines system using mandatory, standard sentencing ranges with circumscribed grounds for departure. And, even in those jurisdictions, the rule applies only to the subclass of defendants whose punishment is increased over the standard sentencing range by the finding of an aggravating fact.

This Court, in holding that *Blakely* error is not structural, has already made clear that *Blakely* does not have comparable sweep and importance to *Gideon*. Because the presence of counsel pervasively affects all aspects of a trial, a complete denial of the right to counsel makes a fair trial impossible. This Court has therefore stated that *Gideon* error is structural and requires automatic reversal when properly raised on direct review. See *Neder* v. *United States*, 527 U.S. 1, 8 (1999). In contrast, the Court has held that *Blakely* error is not structural and does not require automatic reversal. *Washington* v. *Recuenco*, 126 S. Ct. 2546 (2006). In *Recuenco*, the Court concluded that failure to require proof beyond a reasonable doubt of a penalty enhancing fact "does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 2551 (citation and emphasis omitted). That conclusion makes clear that the *Blakely* rule is not the kind of "absolute prerequisite to fundamental fairness" that qualifies for "watershed" status. *Sawyer*, 497 U.S. at 244 (citation omitted).

b. Another indication that *Blakely* is not of bedrock character is that fact-finders may constitutionally use the preponderance of the evidence standard to determine many facts that have as much or more impact on punishment as the facts covered by *Blakely*. For example, facts on which a judge relies to increase a sentence within statutory limits may be determined by a preponderance. *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam); *Nichols* v. *United States*, 511 U.S. 738, 747-748 (1994). The same is true for facts that trigger a statutory mandatory minimum sentence and for facts that reduce the statutory maximum. *Harris* v. *United States*, 536 U.S. 545, 568-569 (2002); *Apprendi*, 530 U.S. at 491 n.16. Even facts that support a sentence above a guidelines range may be proved by a preponderance if the guidelines are advisory rather than mandatory. See *Booker*, 543 U.S. at 233, 259.

Use of the preponderance standard is not limited to facts that bear only on the extent of punishment. Facts that determine the degree of an offense, and facts that determine guilt or innocence of any offense, may be found under the preponderance standard if the legislature declares those facts to be defenses rather than offense elements. Indeed, the government may even impose the burden of proving defenses on the defendant. See, *e.g.*, *Dixon* v. *United States*, 126 S. Ct. 2437 (2006) (duress); *Martin* v. *Ohio*, 480 U.S. 228 (1987) (self-defense); *Patterson* v. *New York*, 432 U.S. 197 (1977) (extreme emotional disturbance).

These examples demonstrate that the reason for the *Apprendi* and *Blakely* rules is not that it is fundamentally unfair for facts with a significant impact on punishment to be found by a preponderance of the evidence. The reason for the rules is, as this Court explained in *Blakely*, "the need to give intelligible content" to the rights of jury trial and proof beyond a reasonable doubt. 542 U.S. at 305. The Court concluded that, to prevent legislatures from eviscerating those rights, there must be a constitutional line that establishes a category of facts to which those rights always attach. But the need for a line does not mean that a rule is of bedrock character when, like the rule in *Blakely*, it merely clarifies that particular facts fall on one side of the line.

Even without the *Blakely* rule, no defendant is exposed to any punishment at all unless the government has proved the core elements of a criminal offense beyond a reasonable doubt. Once that has occurred, the question whether ancillary findings may be established by a preponderance of the evidence does not implicate that small core set of rules that are indispensable to justice, even if those findings have important consequences for the authorization or extent of punishment.

c. In arguing that *Blakely*'s reasonable doubt rule is a bedrock rule, petitioner relies primarily (Br. 31-32) on a statement in *Winship*, and similar statements in other cases, that "a person accused of a crime . . . would be at * * * a disad-

vantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence that would suffice in a civil case." *Winship*, 397 U.S. at 363 (citation omitted). Petitioner ignores essential differences between *Winship*, which recognized the basic rule that guilt of a crime must be proved beyond a reasonable doubt, and *Blakely*, which extended the reasonable doubt requirement to facts supporting upward departures from sentencing guidelines.

Winship held that a family court violated due process by committing a juvenile to a state institution based on findings by a preponderance of the evidence that he had committed acts that, if done by an adult, would constitute larceny. 397 U.S. at 368. Thus, in a case of *Winship* error, the defendant has been denied the right of proof beyond a reasonable doubt on every element of the offense. The error calls into question whether the defendant is guilty of any crime. In a case of *Blakely* error, in contrast, the defendant has been provided the right of proof beyond a reasonable doubt on the facts necessary to establish that he committed a crime. The error does not call into question whether he is guilty of an offense but affects only the extent of punishment that is legally authorized.

This Court's structural error cases confirm that essential difference between *Winship* and *Blakely* error. The failure to require proof beyond a reasonable doubt for an entire offense "vitiates *all* the jury's findings" and pervasively affects the trial in unmeasurable ways. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). *Winship* error is therefore subject to automatic reversal if properly raised on direct review. See *id.* at 281-282. In contrast, the failure to require proof beyond a reasonable doubt for a penalty enhancing fact, or even for a single element of a criminal offense, "d[oes] not 'vitiat[e] *all* the jury's findings'" and does not have the same pervasive effect on the trial. *Neder*, 527 U.S. at 11 (quoting *Sullivan*, 508 U.S. at 281); see *Recuenco*, 126 S. Ct. at 2551-2553. As a

result, *Blakely* error does not *necessarily* render a criminal trial fundamentally unfair. *Id.* at 2551.

d. Petitioner also argues (Br. 33-36) that *Blakely* satisfies the bedrock component of the "watershed" test because the right to a jury trial is essential to fundamental fairness. That argument overlooks that the question before this Court is not whether *Blakely*'s *jury trial* right is a "watershed" rule but whether its *reasonable doubt* requirement has that status. See note 3, *supra*. *Summerlin* already establishes that the jury trial right guaranteed by the *Apprendi* line of cases is not a "watershed" rule. See 542 U.S. at 355-358. Contrary to petitioner's assertion (Br. 33), *Summerlin*'s focus on the jury trial right's failure to satisfy the accuracy component of the "watershed" test is of no moment. *Summerlin* held that the jury trial right is not a "watershed" rule and does not apply retroactively. As a result, if *Blakely* announced a new rule, the only right protected by that decision that could apply retroactively is the right of proof beyond a reasonable doubt.

In any event, petitioner is not correct that *Blakely*'s jury trial right is a bedrock requirement indispensable to fundamental fairness. To be sure, the jury trial right is "fundamental to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968). But that does not mean that it implicates fundamental *fairness*. As the Court explained in *Blakely*, the jury trial right is designed not to ensure fairness but to ensure "the people's ultimate control * * * in the judiciary," just as the right of suffrage ensures popular control of the legislative and executive branches. 542 U.S. at 306. Indeed, the Court suggested that fairness might arguably "be better served by leaving justice entirely in the hands of professionals" than by trial by jury. *Id.* at 313. See also *Ring*, 536 U.S. at 607; *DeStefano* v. *Woods*, 392 U.S. 631, 633-634 (1968) (per curiam).

2. *Violation of the* Blakely *rule does not seriously diminish accuracy*

The fact that *Blakely*'s reasonable doubt rule is not a bedrock element of fairness is itself sufficient to establish that the rule is not a "watershed" rule. But the rule also does not satisfy the second requirement for "watershed" status: infringement of the rule does not "so *seriously* diminish[] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 542 U.S. at 355-356 (internal quotation marks and citation omitted). To meet that requirement, it is not enough that infringement of the rule may have some affect on the accuracy of the criminal proceeding. *Id.* at 356. The diminution in accuracy must be so substantial that it creates an "impermissibly large risk of injustice." *Ibid.* (internal quotation marks omitted). *Blakely*'s reasonable doubt rule does not satisfy that test.

a. The preponderance of the evidence standard is deemed sufficiently reliable for numerous determinations in criminal cases and has long been used in fixing the extent of punishment. Petitioner's argument that there is an impermissibly large risk of inaccuracy when the preponderance standard is used to find facts supporting upward departures from guidelines ranges is premised on a misunderstanding of what the standard requires. Invoking *Winship*, petitioner asserts that "the preponderance standard 'calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.'" Pet. Br. 29 (quoting *Winship*, 397 U.S. at 368). In fact, *Winship* does not endorse that description of the preponderance standard. On the contrary, *Winship* rejects that description as a "*misinterpretation*." 397 U.S. at 367-368 (emphasis added and citation omitted).

The preponderance standard imposes a significantly higher burden of proof than petitioner describes. The prepon-

derance standard requires that the fact-finder be convinced that the existence of the fact at issue is more likely than not. See, *e.g.*, *In re Personal Restraint of Woods*, 114 P.3d 607, 615 (Wash. 2005); *State* v. *Shepherd*, 41 P.3d 1235, 1238 (Wash. Ct. App. 2002). Application of the preponderance standard, properly understood, to facts that enhance a defendant's punishment is not so unreliable that it creates an impermissibly large risk of injustice.

A wide variety of findings that have a profound effect on the outcome of a criminal proceeding may reliably be made by a preponderance of the evidence. The preponderance standard is used to determine the voluntariness of a defendant's confession, the validity of his waiver of his *Miranda* rights, and the voluntariness of his consent to search. *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972); *Colorado* v. *Connelly*, 479 U.S. 157, 168 (1986); *United States* v. *Matlock*, 415 U.S. 164, 177 (1974). The preponderance standard is used to decide whether the discovery of incriminating evidence was inevitable, so that the evidence may be used against the defendant even if it was the product of a constitutional violation. *Nix* v. *Williams*, 467 U.S. 431, 444 & n.5 (1984). And the preponderance standard is used to resolve preliminary factual questions about the admissibility of evidence under the Federal Rules. *Bourjaily* v. *United States*, 483 U.S. 171, 175-176 (1987). This Court has repeatedly stated that there is "nothing to suggest" that those determinations "have been unreliable or otherwise wanting in quality because not based on some higher standard." *Lego*, 404 U.S. at 488; *Connelly*, 479 U.S. at 168.

The reliability of the preponderance standard in determining facts that bear on the extent of punishment is particularly well established. As described above, in traditional, indeterminate sentencing regimes, judges routinely use the preponderance standard to find the facts on which they rely to increase a defendant's punishment within statutory limits. See p. 21, *supra*. Even in determinate sentencing regimes, it is constitutionally permissible to find facts under the preponder-

ance standard in a wide range of circumstances. See, *e.g.*, *Harris*, 536 U.S. at 568-569 (mandatory minimums); *Booker*, 543 U.S. at 233, 259 (facts in advisory guidelines systems).

Those facts can have a "substantial impact" on the defendant's punishment. *Harris*, 536 U.S. at 549 (plurality opinion). For example, they may determine whether someone who uses a firearm in furtherance of a drug trafficking crime is imprisoned for five years, 30 years, or life. See 18 U.S.C. 924(c)(1)(B)(ii), 924(c)(1)(C)(ii). Similarly, they may determine whether a murderer spends only a few years or his entire life in prison. See 18 U.S.C. 1111 (2000 & Supp. IV 2004). It is difficult to conceive how it could be constitutional to find those facts by the preponderance standard if using that standard to find penalty enhancing facts created the serious risk of inaccuracy required by the "watershed" exception.

b. Facts bearing on punishment may be found with sufficient reliability using the preponderance standard because determination of those facts occurs only after a defendant has been found guilty of a criminal offense beyond a reasonable doubt. "Once the reasonable doubt standard has been applied to obtain a valid conviction, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.'" *McMillan*, 477 U.S. at 92 n.8 (citation omitted). Under those circumstances, the preponderance standard may be used to find additional facts that bear on the extent of the defendant's punishment without creating a risk of inaccuracy to the degree required for retroactivity.

That is particularly true because other constitutional protections promote the reliability of fact-finding at sentencing. For example, the defendant has the right to notice of the facts on which the judge may rely to increase his punishment and an opportunity to contest those facts. See *Oyler* v. *Boles*, 368 U.S. 448 (1962). In addition, the defendant has the right to the assistance of counsel. See *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Those protections mitigate any risk of inaccuracy created by use of the preponderance standard.

The essential reliability of the preponderance standard for determining facts that enhance punishment is borne out by experience. On direct review, the federal courts of appeals have frequently found *Apprendi*-type errors harmless because the quantum of proof made no difference to the accuracy of the factual findings.[10] Applying plain error review, those courts have also frequently found that *Apprendi*-type errors neither impaired substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings, because the evidence was essentially uncontroverted or so overwhelming that it did not affect the reliability of the factual findings.[11]

c. In arguing that violations of *Blakely*'s reasonable doubt rule impermissibly diminish accuracy, petitioner invokes (Br. 28-29) two cases that predate *Teague—Ivan V.* v. *City of New*

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[10] See, *e.g.*, *United States* v. *Soto-Beniquez*, 356 F.3d 1, 46 (1st Cir. 2003), cert. denied, 541 U.S. 1074 (2004); *United States* v. *Lawson*, 16 Fed. Appx. 205, 208 (4th Cir. 2001), cert. denied, 534 U.S. 1168 (2002); *United States* v. *Baptiste*, 309 F.3d 274, 278 (5th Cir. 2002), cert. denied, 538 U.S. 947 (2003); *United States* v. *Copeland*, 321 F.3d 582, 605-606 (6th Cir. 2003); *United States* v. *Anderson*, 236 F.3d 427, 430 (8th Cir.), cert. denied, 534 U.S. 956 (2001); *United States* v. *Smith*, 282 F.3d 758, 771-772 (9th Cir. 2002); *United States* v. *Anderson*, 289 F.3d 1321, 1328 (11th Cir. 2002), cert. denied, 537 U.S. 1195 (2003).

[11] See, *e.g.*, *United States* v. *Parrilla-Sanes*, 6 Fed. Appx. 38, 40 (1st Cir.), cert. denied, 534 U.S. 937 (2001); *United States* v. *Henry*, 325 F.3d 93, 102-103 (2d Cir.), cert. denied, 540 U.S. 907 (2003); *United States* v. *Campbell*, 295 F.3d 398, 404-405 (3d Cir. 2002), cert. denied, 537 U.S. 1239 (2003); *United States* v. *Carrington*, 301 F.3d 204, 212-213 (4th Cir. 2002); *United States* v. *Longoria*, 298 F.3d 367, 374 (5th Cir.), cert. denied, 537 U.S. 1038 (2002); *United States* v. *Lopez*, 309 F.3d 966, 970-971 (6th Cir. 2002), cert. denied, 537 U.S. 1178 (2003); *United States* v. *Mansoori*, 304 F.3d 635, 658 (7th Cir. 2002), cert. denied, 538 U.S. 967 (2003); *United States* v. *Wheat*, 278 F.3d 722, 741 (8th Cir. 2001), cert. denied, 537 U.S. 850 (2002); *United States* v. *Pimentel-Tafolla*, 60 Fed. Appx. 656, 670 (9th Cir.), cert. denied, 538 U.S. 1036 (2003); *United States* v. *Perry*, 25 Fed. Appx. 713, 719 (10th Cir. 2001); *United States* v. *Candelario*, 240 F.3d 1300, 1311-1312 (11th Cir.), cert. denied, 533 U.S. 922 (2001); *United States* v. *Webb*, 255 F.3d 890, 901-902 (D.C. Cir. 2001).

York, 407 U.S. 203 (1972) (per curiam), and *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977). Those cases do not establish that *Blakely*'s reasonable doubt rule satisfies the accuracy component of the test for "watershed" rules.

Ivan V. held that *Winship* applied retroactively to cases on direct review, and *Hankerson* held the same for *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). In *Mullaney*, this Court addressed a State rule that required a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter. The Court held that a State that defines a particular fact as an element of an offense may not dispense with the burden of proving that element to the jury beyond a reasonable doubt by relying on a presumption arising from other facts. See *Patterson*, 432 U.S. at 215.

Ivan V. and *Hankerson* offer scant guidance here because they were decided before *Teague* and concerned retroactivity on direct, rather than collateral, review. Petitioner nonetheless asserts that they "control" this case because (according to him) they applied "the very same accuracy-diminishing inquiry that *Teague* later adopted." Pet. Br. 28-29. That is incorrect. Those cases applied a retroactivity standard that *Teague* repudiated as insufficiently responsive to the serious costs to the criminal justice system from disturbing the finality of convictions obtained in accordance with then-existing law. Under the *Teague* standard, an impact on accuracy is insufficient to justify applying a new rule retroactively unless the rule also alters our understanding of the bedrock elements essential to fair criminal proceedings. See *Sawyer*, 497 U.S. at 242; *Banks*, 542 U.S. at 419-420. In addition, the accuracy component of the *Teague* inquiry is more demanding than the accuracy inquiry under prior precedent. See *Teague*, 489 U.S. at 313 (plurality opinion). Under *Teague*, the Court asks whether the diminishment in accuracy from infringing the rule is "so serious[]" that it creates an "impermissibly large risk of injustice." *Summerlin*, 542 U.S. at 356 (internal

quotation marks omitted). The Court did not conduct that inquiry in *Ivan V.* or *Hankerson*.

Moreover, *Ivan V.* and *Hankerson* involved more fundamental errors that pose a more serious risk of inaccuracy than *Blakely* error. *Ivan V.* involved the use of the preponderance standard for determining *all* the elements of an offense, rather than the use of that standard to determine the extent of punishment, as in cases of *Blakely* error. And *Hankerson* did not involve the substitution of the preponderance standard for the reasonable doubt standard. Rather, it involved the allocation to the defense of the burden of disproving an offense element, so that the State could prevail on that element on a finding supported by even less than a preponderance of the evidence. The Court's views on whether the errors in *Ivan V.* and *Hankerson* posed a risk of inaccuracy therefore do not suggest that *Blakely* error "so seriously diminishe[s] accuracy as to produce an impermissibly large risk of injustice." *Summerlin*, 542 U.S. at 356 (internal quotation marks omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

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IN THE

Supreme Court of the United States

LONNIE LEE BURTON,

Petitioner,

vs.

DOUGLAS WADDINGTON, Superintendent,
Stafford Creek Corrections Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. Whether the district court lacked subject mater jurisdiction over the habeas corpus petition where Burton had previously filed a habeas corpus petition challenging his custody, and he did not obtain leave from the Ninth Circuit to file the current petition as required by 28 U. S. C. § 2244(b).

2. Whether *Blakely* v. *Washington*, 542 U. S. 296 (2004) applies retroactively in collateral proceedings filed under 28 U. S. C. § 2254 to cases where the state court judgment became final, and the state court adjudication of the merits of the claim occurred, prior to the issuance of the Court's decision in 2004.

3. Assuming *Blakely* v. *Washington* does apply retroactively, whether the state court adjudication of Burton's claim was contrary to or an unreasonable application of the holding in *Blakely* where each individual sentence imposed on Burton did not exceed the standard sentencing range for the particular offense.

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IN THE

Supreme Court of the United States

LONNIE LEE BURTON,

Petitioner,

vs.

DOUGLAS WADDINGTON, Superintendent,
Stafford Creek Corrections Center,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Amicus CJLF has a particular interest in the retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), and the deference standard of 28 U. S. C. § 2254(d). In *Teague*, *amicus*

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

submitted the brief proposing the rule adopted in that case. See 489 U. S., at 300. Counsel for *amicus* wrote one of the few law review articles defending § 2254(d) as it was written and intended, at a time when it was under severe attack in the law reviews. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998). *Amicus* CJLF has filed a brief in most of this Court's major habeas cases from 1988 to the present.

The decision in *Blakely* v. *Washington* has been called a "train wreck," among other terms, for its damage to sentencing reforms achieved after many years of efforts had finally reached a bipartisan consensus. While these sentencing systems can be repaired prospectively to make the adjustments *Blakely* requires, a fully retroactive application of *Blakely* would require reexamination of every above-standard-range sentence in every jurisdiction with such a reform. The already overburdened system would buckle under such added weight, and many criminals would have their sentences reduced to much less than their actual crimes and criminal histories warrant.

In addition, to reach the *Blakely* issue in this case, the Court would have to decide that every defendant who receives a penalty reversal from the state appellate court can file two federal habeas petitions as a matter of routine: a guilt petition immediately and a sentencing petition after resentencing and review of the new sentence. This would be a serious weakening of the exhaustion and successive petition rules, contrary to the clear intent of Congress in enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

According to the Washington Court of Appeals opinion on direct appeal, Joint Appendix ("J. A.") 44:

"On October 18, 1991, Lonnie Burton followed M.C., a 15-year-old boy, home from school. According to M.C.'s testimony, there was a knock on the door shortly after he arrived from school. M.C. answered the door and found Burton selling season tickets for a local hockey team. After M.C. declined to purchase[] the tickets, Burton asked whether he could use the telephone. When M.C. refused, Burton took out his gun and forced his way into the home.

"He ordered M.C. to go upstairs and into his bedroom and not look at him. Burton then proceeded to have oral and anal intercourse with M.C. by force. After he finished his sexual acts, Burton told M.C. to look at the clock and not move for 15 minutes. Before he left the house, Burton took $160 from the dresser of M.C.'s parents. Later, M.C.'s father arrived and found M.C. still frightened that Burton was in the house. M.C. told his father about the incident and they called the police."

Burton was convicted of rape, robbery, and burglary, all in the first degree. The trial court had to resentence Burton when a prior conviction used in sentencing was overturned and again when the second sentence was reversed on appeal. This case involves the third sentence of 304 months for rape, 153 months for robbery, and 105 months for burglary, served consecutively for a total of 562 months, or 46 years and 10 months. J. A. 45.

Burton has an extensive criminal history. The trial court noted, but did not count, two other cases of rape of a child—one dismissed when the victim "became unavailable" and one reversed on appeal. See J. A. 24, ¶¶6 and 8. The crimes counted by the trial court included rape of a child, sexual exploitation of a minor, child molestation, fraud, theft, and forgery, in addition to the counts in the present case. See J. A. 26, ¶14.

The Washington sentencing system has a grid that produces a standard-range sentence from a row representing the seriousness of the primary offense and a column representing an

"offender score," which includes both unrelated offenses and the secondary offenses in the present case. See *Blakely* v. *Washington*, 542 U. S. 296, 299 (2004); J. A. 49-51. Burton's unrelated offenses alone would have earned him an offender score of 12, but the robbery and burglary counts in the present case raised that score to 16. See J. A. 49-50. However, there is no difference in the sentence between offender scores 12 and 16 on the standard grid. The last column is "9 or more." J. A. 51. Applying the grid without correction would have meant no punishment at all for the robbery and burglary, *i.e.*, "free crimes with no additional penalty." J. A. 52. To avoid this result, the trial court imposed an "exceptional sentence" by making the sentences for the three courts run consecutively. J. A. 30, ¶ 16; J. A. 32.

The state Court of Appeals found that the consecutive sentences were valid under state law based on Burton's convictions in the present and prior cases. Additional aggravating factors mentioned by the trial judge were not legally necessary for the sentence. J. A. 52-53.

On December 23, 1998, while the appeal of the final sentencing was pending, Burton filed a federal habeas corpus petition challenging his conviction. J. A. 38-41. The form expressly warns that state remedies must be exhausted first and that omitted claims may be barred later. J. A. 37-38. This petition was denied April 6, 2000. J. A. 42. The Court of Appeals affirmed.

Back in state court, the judgment was affirmed on direct appeal July 17, 2000. J. A. 43. The Washington Supreme Court denied discretionary review December 5, 2000. Burton did not file a certiorari petition in this Court, and the time to do so expired March 5, 2001.

Burton filed a personal restraint petition in the Washington Court of Appeals, which was denied. App. to Brief for Petitioner 1a. A commissioner of the Washington Supreme Court denied review, citing *State* v. *Gore*, 143 Wash. 2d 288,

21 P. 3d 262 (2001), for denial of the *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) claims. The Washington Supreme Court denied petitioner's motion to modify this ruling on October 8, 2002. App. to Brief for Petitioner 4a.

Burton filed a second federal habeas petition, challenging the sentence. The magistrate judge rejected the state's claim that the petition was "second or successive," J. A. 68, but recommended denial. J. A. 76. The District Court adopted the recommendation. J. A. 77. The Court of Appeals affirmed, J. A. 82, and the court denied rehearing en banc. J. A. 83. This Court granted Burton's petition for certiorari on June 5, 2006.

SUMMARY OF ARGUMENT

Jurisdiction is lacking in this case. Petitioner chose to file a petition challenging the guilt determination before he exhausted state remedies on his sentence. Under these circumstances, a second petition challenging the sentence is successive and cannot be filed in the District Court without authorization from the Court of Appeals.

Burton could not obtain relief without creating a rule that is new beyond *Blakely*. When an enhanced sentence is legally permissible based entirely on convictions in the present and prior cases, such a sentence is not error under *Apprendi* or *Blakely*. Extending those rules to cover this situation would require overruling *Almendarez-Torres* v. *United States*, and that would be a new rule.

Blakely was not dictated by precedent existing in 2001, when Burton's sentence became final. Although there is language in *Apprendi* to support the result in *Blakely*, that is not enough under this Court's "new rule" precedents. There were enough contrary indications in *Apprendi* that reasonable minds could differ as to whether the rule would be carried that far. The split of authority in the states combined with the unanimous view of the federal circuits confirms this. For much

the same reasons, *State* v. *Gore* and the state court's reliance on it in this case were neither contrary to an unreasonable application of clearly established federal law as of October 2002.

The *Blakely* rule is not an "absolute prerequisite to fundamental fairness" so as to qualify for the second exception to the rule of *Teague* v. *Lane*. The bipartisan consensus that the sentencing systems at issue in *Blakely* and *Booker* were salutary reforms, more fair than the clearly constitutional systems they replaced, refute any such argument.

The rule of 28 U. S. C. § 2254(d) is independent of *Teague*. Congress chose to omit the *Teague* exceptions. Courts cannot read in what Congress chose to omit.

ARGUMENT

I. The District Court did not have jurisdiction to consider this successive petition.

The trial court entered the sentence which is the subject of the present petition on March 31, 1998. J. A. 33. Nine months later, while his appeal on the sentence was pending (the conviction having been affirmed earlier), Burton filed a federal habeas petition stating three grounds relating to the conviction plus "cumulative error." J. A. 39. The form he filled out contains this warning: "CAUTION in order to proceed in federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition you may be barred from presenting additional grounds at a later date." J. A. 37-38. This petition was denied April 6, 2000, J. A. 42, and the Ninth Circuit affirmed May 30, 2001. See Opp. to Pet. for Cert. 2.

Petitioner argues for a breathtaking expansion of the very limited rule of *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), one that would largely defeat the objective of avoiding piecemeal litigation. The general rule that piecemeal habeas

petitions will not be allowed and that all challenges to a judgment must be brought in one petition has been clear at least since *Rose* v. *Lundy*, 455 U. S. 509 (1982). To implement the underlying policies of the habeas statute, see *id.*, at 519-520, *Lundy* adopted a total exhaustion rule. This rule "provides a simple and clear instruction to potential litigants: before you bring *any* claims to federal court, be sure you first have taken *each one* to state court." *Id.*, at 520 (emphasis added). This rule is simple enough for *pro se* prisoners to understand, see *ibid.*, and it is plainly set forth in the standard form provided to them. See J. A. 38. *Lundy* also made clear that if the prisoner chooses to go forward in federal court with only the exhausted claims, "the prisoner would risk forfeiting consideration for his unexhausted claims in federal court." 455 U. S., at 520.

The statute of limitations in the AEDPA was intended to promote, not inhibit, the policy against piecemeal habeas litigation, and this court interpreted AEDPA to advance that purpose in *Duncan* v. *Walker*, 533 U. S. 167, 180 (2001). "A diminution of statutory incentives to proceed first in state court would also increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce. Cf. *Rose*, 455 U. S., at 520. . . . We do not believe that Congress designed the statute in this manner."

"AEDPA preserved *Lundy*'s total exhaustion requirement . . . , but it also imposed a 1-year statute of limitations . . . ." *Rhines* v. *Weber*, 544 U. S. 269, 274 (2005). To deal with the "interplay" between these requirements, *Rhines* authorized a " 'stay and abeyance' procedure" in the circumstances of that case. See *id.*, at 275. However, Rhines' situation was quite different from Burton's. The judgment in Rhines' case, including both conviction and sentence, had become final long before he filed his federal habeas petition. See *id.*, at 272. The state remedies he needed to exhaust were collateral, not direct appeal. The federal habeas limitation clock was ticking while the federal court considered the exhaustion question.

Burton, on the other hand, had no need for "stay-and-abeyance," so the pre-*Rhines* doubt over the availability of that procedure is irrelevant. The clock does not start until "the date on which the *judgment* became final by the conclusion of direct review . . . ." 28 U. S. C. § 2244(d)(1)(A) (emphasis added). The meaning of the word "judgment" in this context has long been settled. "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U. S. 211, 212 (1937).

Petitioner maintains that he was in danger of having his guilt-phase claims dismissed as untimely if he had waited to file a single petition after his appeal from the resentencing proceeding was completed. See Reply in Support of Pet. for Cert. 10. The magistrate judge accepted this argument. See J. A. 66. Yet neither he nor petitioner cites a single case where any federal court has actually denied federal review of any guilt-phase claim for failure to seek such review while appeal of the sentence was pending. Petitioner claims that uncertainty on this point was not resolved until *United States* v. *Colvin*, 204 F. 3d 1221 (CA9 2000). See Reply in Support of Pet. for Cert. 11. The *Colvin* opinion does not read like it is resolving any uncertainty on this point. The disputed issue in *Colvin* was when a judgment becomes final if the Court of Appeals decision resolves all disputed issues but remands to the District Court for a ministerial act. See 204 F. 3d, at 1224. In the course of the discussion, the court mentioned matter-of-factly that the judgment is not final "as long as a defendant may appeal either the conviction or sentence," *ibid.*, and nothing more than a bare citation to Federal Rule of Criminal Procedure 32(d)(1) was deemed necessary to support this obvious and undisputed statement. See *id.*, at 1224, n. 3.

The unity of the criminal judgment is clear from this Court's precedents on direct appeal. For example, in *Flanagan* v. *United States*, 465 U. S. 259 (1984), the Court noted, "In a criminal case the [final judgment] rule prohibits appellate review until conviction *and imposition of sentence*." *Id.*, at 263

(emphasis added) (citing *Berman*, *supra*). Conviction and sentence are parts of a single criminal case, and *Mitchell* v. *United States*, 526 U. S. 314, 327 (1999), declared that arguing they were separate was "contrary to the law and to common sense." Although the Court *allowed* the defendant to seek review by certiorari when the penalty verdict had been reversed in *Brady* v. *Maryland*, 373 U. S. 83, 85, n. 1 (1963), it had to resort to the "collateral order" doctrine to do so. It does not appear that the Court has ever suggested, much less held, that a defendant in this situation *must* seek separate review of the guilt determination or forfeit his right to seek guilt-phase review after resentencing.

Acts of Congress and the policies that underlie them cannot be brushed aside on the speculative apprehension that a court might construe the term "judgment" in a manner contrary to its long-settled usage. Congress preserved and strengthened the exhaustion rule at the same time it enacted the statute of limitations. Statutes cannot be rewritten by the courts even when they *really do* create harsh results. See *Dodd* v. *United States*, 545 U. S. 353, 125 S. Ct. 2478, 2483, 162 L. Ed. 2d 343, 350-351 (2005). *A fortiori*, a court should not subvert a statute to avoid a purely imaginary dilemma.

The Court of Appeals did not mention the nonexistent dilemma, but instead it matter-of-factly made a breathtaking expansion of the rule of *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), an expansion that would authorize two federal habeas petitions in *every* case where a state appellate court affirms the conviction but reverses the sentence. The Court of Appeals said the new petition was not "second or successive" within the meaning of 28 U. S. C. § 2244(b)(3)(A) because the sentencing claim was not "ripe" at the time of the first petition. See J. A. 79. This "ripeness" problem arose because the sentencing claims were unexhausted at the time the guilt-phase claims were presented in federal habeas. The authority for the proposition that the second petition is not "second or successive" is *LaGrand* v. *Stewart*, 170 F. 3d 1158,

1159 (CA9 1999), which in turn is based on the Ninth Circuit's opinion in *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628 (CA9 1997), aff'd, 523 U. S. 637 (1998).

LaGrand is doubtful authority in light of the fact that this Court vacated the stay, see *Stewart* v. *LaGrand*, 525 U. S. 1173 (1999), Karl LaGrand was executed, and the then-moot petition for certiorari was dismissed upon request of the state. See *Stewart* v. *LaGrand*, 526 U. S. 1061 (1999). In any event, both *LaGrand* and *Martinez-Villareal* are readily distinguishable, and they cannot be read to declare open season for piecemeal habeas review of state criminal judgments.

Both cases involve attacks on the execution of the judgment and not the judgment itself. *Martinez-Villareal* involved a "competency to be executed claim." See 523 U. S., at 641. Such a claim does not attack the judgment of the court but only claims it cannot be executed so long as the prisoner remains mentally incompetent. Because mental competence is a changeable condition, such a claim is premature until execution is imminent, which necessarily means after the attacks on the judgment have been litigated. See *id.*, at 644-645.

Method of execution claims also are not attacks on the judgment. See *Hill* v. *McDonough*, 547 U. S. __, 126 S. Ct. 2096, 2103-2104, 165 L. Ed. 2d 44, 53-54 (2006). That is why they do not necessarily have to be brought in habeas corpus. See *ibid.* They are "ripe" as soon as the judgment is entered or the state changes its method, whichever is later. Method of execution claims are different from attacks on the judgment, and *LaGrand* provides no support for jurisdiction in the present case.[2]

Reversals for resentencing while affirming the conviction are not at all unusual. In capital cases, the "annually improvised Eighth Amendment 'death is different' jurisprudence,"

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2. The question of whether the Ninth Circuit's successive petition holding in *LaGrand* was correct was largely mooted by *Hill*.

Morgan v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), has been a cause of such reversals for many years. Now that noncapital sentencing law has grown more complex, such reversals are common in all criminal cases. If the defendant in *every* such case can file two federal habeas petitions as a matter of routine, which is what the Ninth Circuit held in this case, the implications are staggering. The burden on the states to marshal their resources to keep their convicts in prison, which is already substantial, see *Beard* v. *Banks*, 542 U. S. 406, 413 (2004), will be greatly increased.

Burton was clearly and expressly warned that proceeding with his guilt-phase claims before he exhausted state remedies on his sentencing claims might preclude federal review of the latter. He chose to go ahead. The present petition is successive. The District Court had no jurisdiction to consider it without an authorization from the Court of Appeals, which Burton did not seek or obtain and which he would not have qualified for. The case should be remanded to dismiss for lack of jurisdiction.

II. *Almendarez-Torres* precludes a finding of *Blakely* error in this case, making it a poor vehicle to resolve the question presented.

The trial judge in the present case gave three reasons for imposing an "exceptional sentence": "[t]he defendant's long criminal history, combined with the 'multiple offense policy,' " J. A. 29, "deliberate cruelty," J. A. 30, and "sophistication and planning." J. A. 31. However, the Court of Appeals dismissed Burton's challenge to the latter two, upholding the trial court's ruling that first reason is sufficient, standing alone, to justify the sentence as a matter of state law. See J. A. 52-53. This holding is binding on the federal habeas court. See *Bradshaw* v. *Richey*, 546 U. S. __, 126 S. Ct. 602, 604, 163 L. Ed. 2d 407, 411-412 (2005) (*per curiam*).

In *Almendarez-Torres* v. *United States*, 523 U. S. 224, 239 (1998), the defendant anticipated the holding of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and argued that the sentencing factor in his case had to be treated as an element of the offense and be proven to a jury beyond a reasonable doubt. The Court rejected that argument as applied to the factor of recidivism. See *Almendarez-Torres*, *supra*, at 243-244. Although the *Apprendi* opinion would later make disparaging remarks about *Almendarez-Torres*, see 530 U. S., at 487, 489-490, it did not overrule that case, see *id.*, at 490 (exception for prior conviction), and it remains a precedent of this Court to this day. See *Rangel-Reyes* v. *United States*, 547 U. S. __, 126 S. Ct. 2873, 2874, 165 L. Ed. 2d 910, 911 (2006) (Stevens, J., respecting denial of certiorari). Whatever arguments may be made for overruling *Almendarez-Torres*, see *id.*, 126 S. Ct., at 2874-2875, 165 L. Ed. 2d, at 911-912 (Thomas, J., dissenting), that step cannot be taken on habeas corpus.

A case overruling a precedent of this Court *per se* makes a new rule. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Whorton* v. *Bockting*, No. 05-595, p. 7. *Almendarez-Torres* does not negate any "absolute prerequisite to fundamental fairness," see *infra*, at 20, that would even arguably qualify a contrary rule for the second exception to *Teague* v. *Lane*, 489 U. S. 288 (1989). See *Rangel-Reyes*, 126 S. Ct., at 2874, 165 L. Ed. 2d, at 911 (opn. of Stevens, J.) (no "significant risk of prejudice to the accused"). Further, it is clear beyond dispute that a state-court decision denying an *Apprendi* claim in a case where the sentencing factor is a prior conviction is not contrary to or an unreasonable application of the body of precedent including *Almendarez-Torres*. Cf. 28 U. S. C. § 2254(d)(1). Quite the contrary, all other courts of the nation *must* follow *Almendarez-Torres* unless and until this Court overrules it. See *Agostini* v. *Felton*, 521 U. S. 203, 237 (1997).

Regardless of whether *Blakely* is retroactive, granting relief to Burton would require a rule that is new beyond *Blakely*. The

Blakely retroactivity question should not be decided in a case where nothing depends on it. Cf. *Teague*, 489 U. S., at 316. Even if the Court has jurisdiction, but see *supra*, Part I, the writ of certiorari should be dismissed as improvidently granted.

III. The *Blakely* rule was neither "dictated by precedent" in 2001 nor "clearly established" in 2002.

A. Teague v. Lane.

> "Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process. . . . First, the court must determine when the defendant's conviction became final. Second, it must ascertain the 'legal landscape as it then existed,' . . . and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. . . . That is, the court must decide whether the rule is actually 'new.' Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity." *Beard* v. *Banks*, 542 U. S. 406, 411 (2004) (citations omitted).

Step one is straightforward. The Washington Supreme Court denied discretionary review on December 5, 2000. The case became "final" for retroactivity purposes upon the expiration of time to file a certiorari petition, see *ibid.*, which was 90 days later, on March 5, 2001. This date is about nine months after *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), fifteen months before *Ring* v. *Arizona*, 536 U. S. 584 (2002), over three years before *Blakely* v. *Washington*, 542 U. S. 296 (2004), and almost four years before *United States* v. *Booker*, 543 U. S. 220 (2005).

The landscape of "*Apprendi*-land"[3] on March 5, 2001, was rather sparse. None of the state guidelines cases that later

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3. See *Ring*, 536 U. S., at 613 (Scalia, J., concurring).

formed the split of authority resolved in *Blakely*, see Pet. for Cert. in *Blakely* v. *Washington*, No. 02-1632, pp. 7-10, had yet been decided. The federal circuits were rapidly and unanimously deciding that *Apprendi* did *not* overturn the Federal Sentencing Guidelines. See *United States* v. *Penaranda*, 375 F. 3d 238, 243, n. 5 (CA2 2004) (collecting cases). Given that this Court's holding in *Booker* was contrary to the unanimous view of the circuits in the immediate aftermath of *Apprendi*, a new rule must have been created at some point between *Apprendi* and *Booker*.

Which of the steps from *Apprendi* to *Ring* to *Blakely* to *Booker* was a new rule? Petitioner contends that *Blakely* was dictated by *Apprendi* and that the big conceptual leap came in *Booker*. See Brief for Petitioner 25. *Amicus* CJLF believes that each of these steps was new within the meaning of *Teague*, but the question before the Court is merely the newness of *Blakely* after *Apprendi*. For perspective on that question, it is useful to return to the day *Blakely* was announced. Professor Douglas Berman, who specializes in sentencing law, had this to say on his widely read blog:

> **"Blakely..... WOW!!**
>
> "The Supreme Court handed down *Blakely v. Washington* this morning, and the only word that summarizes the ruling is WOW. Here is a link to all the opinions in Blakely, which essentially holds that ***any and every*** fact which increases the legally available sentence must be found by a jury or admitted by the defendant. In other words, it will no longer be constitutional for guideline sentencing systems to allow *judges* to find facts which increase applicable sentencing ranges. Of course, this is how nearly every sentencing guideline system works, and thus the ramifications of this decision for modern sentencing reforms cannot be overstated.
>
> "Each of the four opinions --- Scalia for the majority, O'Connor, Kennedy and Breyer all dissenting --- is rich

> with intriguing ideas, compelling arguments and rhetorical flourishes. Sentencing scholars and also constitutional scholars are likely to be talking about this opinion for a long time. And, of course, Blakely will not be the last word on these subjects. There will be lots and lots more litigation (some of which will surely make its way again to the Supreme Court) about what this rule now means for the operation of structured sentencing systems. Stay tuned." D. Berman, *Blakely*..... WOW!!, Sentencing Law & Policy (June 24, 2004), available at http://sentencing.typepad.com/sentencing_law_and_policy/2004/06/blakely_wow.html (as visited Sept. 19, 2006) (emphasis in original).

That would be a most curious reaction to a decision that "broke no new legal ground." Cf. Brief for Petitioner 20. Professor Frank Bowman had a decidedly less positive view of *Blakely* but no lesser estimate of the magnitude of the change. See Bowman, Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of *Blakely v. Washington*, 41 Am. Crim. L. Rev. 217 (2004).

The reaction of the federal courts of appeals in the wake of *Blakely* is similarly informative. Cases are collected in Justice Breyer's *Booker* dissent. See 543 U. S., at 329. In *United States* v. *Ameline*, 376 F. 3d 967, 973 (2004), the Ninth Circuit said, "With its clarification of a defendant's Sixth Amendment rights, the *Blakely* court worked a sea change in the body of sentencing law." (Footnote omitted.) The Fifth Circuit said, "Undeniably, *Blakely* strikes hard at the prevailing understanding of the Guidelines." *United States* v. *Pineiro*, 377 F. 3d 464, 470 (2004). If *Blakely* had merely been a simple, straightforward application of *Apprendi*, it could not have "struck hard" at the Guidelines, because the blow would already have landed in *Apprendi* itself. The Seventh Circuit opinion in *Booker* says it most directly. After discussing the understanding of "statutory maximum" implicit in *Edwards* v. *United States*, 523 U. S. 511 (1998), Judge Posner's opinion says, "That was of course the understanding before *Blakely, but Blakely redefined*

'*statutory maximum.*' " *United States* v. *Booker*, 375 F. 3d 508, 514 (2004) (emphasis added).

The argument that *Apprendi* dictated *Blakely* is, in essence, that if one lifts *Apprendi*'s statement of its rule from the opinion, puts on blinders to block all other considerations, and plugs it in to the facts of *Blakely*, the result pops out. See Brief for Petitioner 18-19. The development of constitutional law does not follow such a simplistic path. There are always competing considerations, and as the application of a rule gets further from the core principles that produced it, there often comes a point where those other considerations preclude further expansion of the rule. As the cat creeps farther out on the tree limb and away from the trunk, it gets to a point where the limb breaks.

The exclusionary rule cases illustrate that principles are not always extended to their logical extreme. Reading Justice Clark's sweeping language in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), one might very well conclude that evidence obtained in violation of the Fourth Amendment was excluded in all proceedings before all tribunals in the United States. See, *e.g.*, *id.*, at 654-655 ("close the only courtroom door remaining open"). It did not happen. The costs and benefits were weighed at each decision point, and the decisions were generally against exclusion. See, *e.g.*, *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 362-365, 369 (1998); *Hudson* v. *Michigan*, 547 U. S. __, 126 S. Ct. 2159, 2168, 165 L. Ed. 2d 56, 69 (2006).

Even though the Court may decide in a case that the result logically follows from a precedent, that is not enough to preclude a conclusion that the rule is new for *Teague* purposes. See *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990). Contrary indications in this Court's case law may be sufficient for reasonable jurists to conclude that the earlier precedent would not be extended as far as it later was. See *Ibid.*

There are muitiple indications within *Apprendi* itself that its rule might not extend to a guidelines system such as the case in *Blakely*. The opinion implies that functional equivalence to a greater degree of offense is the characteristic that triggers its rule, and that sentencing systems where the factors are not so equivalent are distinguishable. See 530 U. S., at 494, n. 19. In a guidelines system in which the judge is free to consider *any* aggravating factors, not just those on a statutory list, the factors do not resemble the elements of an offense. If the vagueness test for the definition of offenses applied, see 1 W. LaFave, Substantive Criminal Law § 2.3(a), pp. 144-146 (2d ed. 2003), an authorization to consider any relevant aggravating fact would fail. Such an authorization is infinitely vague.

Second, *Apprendi* expressly rejected the argument that its rule was inconsistent with *Walton* v. *Arizona*, 497 U. S. 639 (1990). See 530 U. S., at 496-497. The distinction between the eligibility decision and the selection decision was well understood by the time of *Apprendi*. See *Tuilaepa* v. *California*, 512 U. S. 967, 971-973 (1994). By disclaiming any conflict with *Walton*, *Apprendi* strongly implied that the "statutory maximum" for murder in Arizona is death and that the additional requirement to find an aggravating factor would not be subject to *Apprendi*'s requirements. The Court later decided in *Ring*, 536 U. S., at 602-603, that *Apprendi* was wrong on this point and overruled *Walton* and, implicitly, this part of *Apprendi*. However, *Ring* was not decided until after the judgment in the present case became final. As of the finality date, it was quite possible that this Court would reconcile the cases by taking a more nuanced view of what constitutes the statutory maximum for *Apprendi*.

Finally, there is the concluding footnote. See *Apprendi*, 530 U. S., at 497, n. 21. The *Apprendi* Court disclaims any ruling on the Federal Sentencing Guidelines "beyond what this Court has already held." This is followed by a quote from *Edwards*, 523 U. S., at 515, noting that "a maximum sentence set by statute trumps a higher sentence set forth in the Guide-

lines." This quote implies that statutory maximums and Guidelines maximums might be considered as different for *Apprendi*'s rule. Further, reasonable minds could conclude that guidelines systems are distinguishable from sentence enhancements regardless of whether the guidelines are enacted by a legislature directly or issued by a commission and given mandatory force by a legislature.

Apprendi involved a sentence enhancement which bore a strong resemblance to a higher degree of offense. A specific, statutorily defined fact had to be found to make the defendant eligible for a sentence he could not have been given without that fact. *Blakely* extended that rule to a system where there is a wide statutory range, a more limited standard range, and discretion to depart from the standard range upon a finding of justifying reasons which need not be listed in any statute. See *Blakely*, 542 U. S., at 299 (listed factors are illustrative, not exhaustive). This was a dramatic expansion of the *Apprendi* rule. The fact that it may have been a predictable development does not mean that it was not new. See *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990). *Blakely* v. *Washington* created a new rule within the meaning of *Teague* v. *Lane*.

B. AEDPA.

On March 22, 2001, 17 days after the judgment in this case became final for *Teague*, the Washington Supreme Court decided *State* v. *Gore*, 143 Wash. 2d 288, 21 P. 3d 262. On July 16, 2002, a commissioner of the Washington Supreme Court denied review of a Court of Appeals decision dismissing Burton's personal restraint petition. App. to Brief for Petitioner 3a. A state-law claim was rejected on the ground of prior adjudication, but the *Apprendi* claim was rejected on the merits, citing *Gore*. On October 8, 2002, the court denied petitioner's motion to modify that ruling. App. to Brief for Petitioner 4a.

The Washington Supreme Court's October 2002 ruling can be fairly read as a disposition on the merits. The inference is

stronger here than it was in *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991), where the Court adopted a "look-through" presumption that an unexplained refusal to review a lower court ruling is on the same ground as the last explained disposition.

The question of whether a rule was "clearly established" under AEDPA at a particular point in time is substantially the same as the question of whether it was "new" for *Teague* purposes, see *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000), but the two rules look to different points in time. While *Teague* looks at the law as of the date of finality on direct appeal, see *supra*, at 13, § 2254(d) looks to the state of the law at the "time of the relevant state-court decision." *Ibid.*

Most of the argument that *Blakely* was a new rule under *Teague* also applies to the argument that the *Blakely* rule was not clearly established at the time of the relevant state-court decision. The one important change in the legal landscape in the interim was *Ring* v. *Arizona*'s overruling of *Walton* v. *Arizona*. Although *Ring* indicates that the Court was inclined to construe "statutory maximum" more expansively than it would have appeared from *Apprendi* on its face, it did not go so far as to clearly establish that the Court would pull the rug out from under decades of noncapital sentencing reform. Capital sentencing had been driven by this Court's case law with legislatures enacting whatever they thought would pass muster, while noncapital sentencing reform had been enacted by legislatures that believed they had wide latitude to adopt reforms they believed to be wise policy. *Ring*'s about-face on *Walton* might have been a development limited to the arcane world of capital sentencing.

As the reaction to *Blakely* described *supra*, at 14, indicates, *Blakely* was the biggest leap in the series from *Apprendi* to *Booker*. Before *Blakely*, "statutory maximum" was known to encompass sentence enhancements such as in *Apprendi* and eligibility for the death penalty as in *Ring*, but its application to a guidelines range contained within a broader overall statutory range was not clearly established.

The Washington Supreme Court's decision in *Gore* that *Apprendi* did not apply to its guidelines system was ultimately held to be incorrect, but that is not sufficient to make it an "unreasonable application" of *Apprendi*. See *Williams*, 529 U. S., at 412. The "precise contours" of the *Apprendi* rule were unclear, cf. *Lockyer* v. *Andrade*, 538 U. S. 63, 72-73 (2003), especially as applied to a guidelines system, because *Apprendi* did not decide whether the "statutory maximum" in such a system was the top of the guidelines range or the outer statutory limit.[4]

State v. *Gore* was neither contrary to nor "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), as of October 2002. Neither was the state court's rejection of Burton's claim based on *Gore*. The criterion established by Congress for collateral attack on a final state criminal judgment has not been met.

IV. The *Blakely* rule is not an "absolute prerequisite to fundamental fairness."

A. In General.

The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), limiting the retroactivity on habeas of new rules of criminal procedure has an exception[5] which is often sought and never found in this Court's *Teague* cases. The exception has been described in different ways, but the phrase that captures it best is that it is

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4. Even if *Apprendi* had said something on a issue not presented by the case, it would have been dictum and not holding, and dictum does not establish law for the purpose of § 2254(d)(1). See *Williams*, 529 U. S., at 412.

5. Substantive rules, previously considered the "first exception," are now considered to be simply outside the scope of the rule. See *Beard* v. *Banks*, 542 U. S. 406, 417, n. 7 (2004). *Blakely* is obviously not substantive. See *Butler*, 494 U. S., at 415.

for new rules which are an "absolute prerequisite to fundamental fairness." *Id.*, at 314; *Sawyer* v. *Smith*, 497 U. S. 227, 244 (1990) (quoting *Teague*); *Beard* v. *Banks*, 542 U. S. 406, 419 (2004) (quoting *Sawyer*).

Aside from such general expressions, the Court has illustrated the exception by comparison. Since *Teague* itself, the Court has "referred to the rule of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel), and only to this rule," *Banks*, 542 U. S., at 417, as an example of the magnitude required. If the rule lacks "the primary and centrality of the rule adopted in *Gideon*," *id.*, at 420 (quoting *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990)), it does not qualify for the second exception. On the *same day* that the Court decided *Blakely*, the Court also declared, "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception," *ibid.*, and "it is unlikely that any . . . ha[s] yet to emerge." *Schriro* v. *Summerlin*, 542 U. S. 348, 352 (2004) (internal quotation marks omitted).

Teague itself did provide a few examples besides *Gideon*. *Teague*, 489 U. S., at 313-314, quoted Justice Stevens' examples of fundamental rules from his dissent in *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982):

> "This category cannot be defined precisely; concepts of 'fundamental fairness' are not frozen in time. But the kind of error that falls in this category is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence;[9] that the prosecutor knowingly made use of perjured testimony;[10] or that the conviction was based on a confession extorted from the defendant by brutal methods.[11]

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9. *Moore* v. *Dempsey*, 261 U.S. 86.

10. *Mooney* v. *Holohan*, 294 U.S. 103.

11. See *Brown* v. *Mississippi*, 297 U.S. 278 (direct appeal)."

These examples further flesh out what is required before a rule qualifies as an "absolute prerequisite to fundamental fairness." The practice forbidden by the rule must transform the trial into a mockery of justice.

Are the sentencing guidelines systems enacted as reforms by Congress and by the legislatures of numerous states over the last couple of decades, see *Blakely*, 542 U. S., at 323 (O'Connor, J., dissenting), such travesties of justice as to be in the same league with brutally extracted confessions, knowing use of perjured testimony, mob-dominated trials, or pitting an illiterate layman against an educated, experienced trial lawyer? The question answers itself.

The *Apprendi* opinion waxes nostalgic for common law sentencing, when the prescribed punishment for all felonies—death—followed directly from the jury verdict. See *Apprendi*, 530 U. S., at 478.[6] The members of the First Congress were not nearly so enamored of common law sentencing. They replaced it eight months after they proposed the Bill of Rights.

On April 30, 1790, Congress enacted "An Act for the Punishment of certain Crimes against the United States," 1 Stat. 112. The only crimes for which a defendant could predict the punishment with certainty from the indictment, cf. *Apprendi*, 530 U. S., at 478, were the capital ones. For example, murder in a federal enclave was punished by death, period, under § 3 of the Act, and benefit of clergy was abolished by § 31. Noncapital crimes had only maximums, leaving to the judge the choice of any lesser sentence. Under § 7, for example, the punishment for manslaughter was imprisonment "not

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6. In reality, since the early 1700's all first offenders for most felonies were eligible for a greatly mitigated punishment through "benefit of clergy," and juries had very little to do with determining eligibility for that mitigation. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Ring* v. *Arizona*, No. 01-488, pp. 3-8, available at http://www.cjlf.org/briefs/Ring.pdf.

exceeding three years" and a fine "not exceeding one thousand dollars."

Judicial discretion to sentence within a range was thus a feature of federal criminal law—the only law to which the Sixth Amendment originally applied—before that amendment was ratified. *Williams* v. *New York*, 337 U. S. 241, 251 (1949), confirmed what had already been long understood, that the facts determining choice of sentence within a range may be determined by the judge and are not subject to any particular standard of proof or rules of evidence. The sentencing reforms at issue in *Blakely* and *Booker* had statutory outer ranges of sentences for each crime or class of crimes, similar to those that existed in the pre-reform systems, coupled with an inner range from which the judge could not depart without an objective reason. See *Blakely*, 542 U. S., at 299; *Booker*, 543 U. S., at 234.

Considered in isolation, the requirement that the facts supporting an upward departure must be found beyond a reasonable doubt might be considered important to an accurate determination of the sentence for which the defendant is legally eligible. However, *Sawyer* v. *Smith*, 497 U. S. 227 (1990), tells us that enhancement of accuracy is not enough and that considering the change in isolation is error.

Most new rules created in recent times have enhanced the accuracy of the trial. This is particularly true in the sentencing area. *Sawyer*, 497 U. S., at 243, noted that extending retroactivity to new capital sentencing rules that enhance accuracy would amount to a practical overruling of the holding of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), that *Teague* applies to the penalty phase. Incremental improvements in accuracy, even improvements of "systemic value," *Sawyer*, *supra*, at 244, are not enough.

The change must be considered in the environment of preexisting rules. See *ibid.* It must be considered *in vivo* and not *in vitro*. *Sawyer* held that the prosecutor comment rule of

Caldwell v. *Mississippi*, 472 U. S. 320 (1985), was not an " 'absolute prerequisite to fundamental fairness,' " 497 U. S., at 244 (quoting *Teague*), given that pre-*Caldwell* defendants had the protection of the due process rule of *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974).

Given that the State of Washington could have authorized the judge to sentence *Blakely* anywhere in the outer range set by statute for his crime for any reason or no reason, was a system that restricted the judge to an inner range in the absence of undefined aggravating circumstances fundamentally unfair? The number of legislatures that enacted such reforms in the sincere belief that they were *improving* the fairness of sentencing refutes such a notion. See *Blakely*, 542 U. S., at 323 (O'Connor, J., dissenting) (numerous systems); *id.*, at 326-327 (Kennedy, J., dissenting) (need to respect collective wisdom of legislatures). In Congress, the Sentencing Reform Act was the product of a remarkable bipartisan coalition including such ideologically polar opposites as Senators Strom Thurmond and Edward Kennedy. See Brief for Sens. Kennedy, Hatch, and Feinstein as *Amici Curiae* in *United States* v. *Booker*, No. 04-104, pp. 12-15.

It is one thing to hold, as *Blakely* and *Booker* did, that this broad national legislative consensus was mistaken as to what the Sixth Amendment permits. It would be quite another to hold, as petitioner asks, that the system so created was so fundamentally unfair as to be in the same league with the practices at issue in *Gideon*, *Moore*, or *Brown*. See *supra*, at 21. The rule of *Blakely* does not qualify for the second *Teague* exception.[7]

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7. *Amicus* CJLF has argued in another case presently before the Court that the time has come to declare outright what the Court has previously hinted. There are no rules of *Gideon* magnitude remaining to be made and there have not been for a long time. The second *Teague* exception should be formally laid to rest. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Whorton* v. *Bockting*, No. 05-595, p. 12, available at http://www.cjlf.org/briefs/Bockting.pdf.

B. Schardt v. Payne.

Amici supporting the petitioner cite the case of *Schardt* v. *Payne*, 414 F. 3d 1025 (CA9 2005),[8] as "the paradigm example" of *Blakely* as an innocence-protection rule. See Brief of National Association of Criminal Defense Lawyers and Washington Association of Criminal Defense Lawyers as *Amici Curiae* 7 ("NACDL Brief"). Actually *Schardt* is an example of the injustice that would be caused by applying *Blakely* retroactively.

Schardt was a resident child molester who victimized B.E., the 10-year-old daughter of his live-in girlfriend, repeatedly, several times a month for more than a year. See 414 F. 3d, at 1027-1029. The jury found at least one specific act of rape to be proven beyond a reasonable doubt. See *id.*, at 1029. *Amici*, represented by counsel for Schardt, quote the State's sentencing memorandum that although B.E. could vividly remember repeated molestations, she was unable to pinpoint them in time or separate out her memories of Schardt's numerous victimizations of her. See NACDL Brief 9-10.

From the fact that the State could not prove these other molestations as separate crimes, *amici* leap to the conclusion that *Blakely* would have changed the result had it been in effect at the time of the trial. NACDL Brief 11. That conclusion does not follow. *Blakely* changed who must decide sentence-eligibility facts and the burden of proving them, but it did not change the substantive facts which must be proved. If under Washington law a course of repeated molestations over a period of time without identifying specific instances was an aggravating fact authorizing an exceptional sentence before *Blakely*, it still is after *Blakely*.

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8. Schardt filed a certiorari petition and motion to proceed in forma pauperis on November 10, 2005, in case No. 05-9237. The motion was denied on May 30, 2006, and Schardt was given until June 20 to pay the fee and submit a printed petition. He apparently did not, and the online docket indicates the case was considered closed on June 29.

What would happen, in real terms to real people, if Schardt's 17-year sentence for this 1997 crime were overturned by retroactive application of *Blakely*? Either B.E. would have to endure testifying to these traumatic events again at resentencing, or Schardt would have his sentence reduced to 8½ years, see 414 F. 3d, at 1029, meaning immediate release with the very substantial possibility of preying on another child. Neither B.E. nor that other child should have to endure this. Schardt, like Burton, was properly sentenced for the crime he committed under a fair system operating in accordance with the Sixth Amendment as it was understood at the time.

V. The prior adjudication rule of AEDPA does not incorporate the *Teague* exceptions.

Regardless of whether the *Blakely* rule qualifies for the second *Teague* exception, there is no such exception to 28 U. S. C. § 2254(d)(1). *Amicus* CJLF has fully presented this argument in the *Bockting* case, so we will simply incorporate it here by reference. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Whorton* v. *Bockting*, No. 05-595, pp. 13-23, available at http://www.cjlf.org/briefs/Bockting.pdf.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be vacated and the case remanded with directions to dismiss for lack of jurisdiction, or else the writ of certiorari should be dismissed as improvidently granted. If the Court does reach the merits, the decision should be affirmed.

October, 2006

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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No. 05-9222

IN THE

Supreme Court of the United States

LONNIE L. BURTON,
Petitioner,

v.

DOUG WADDINGTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INDIANA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, HAWAII, ILLINOIS, MICHIGAN, MONTANA, NEVADA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA, VERMONT, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6255

STEVE CARTER
Attorney General of Indiana
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief

**Counsel of Record* *Counsel for Amici Curiae*
(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

TERRY GODDARD
Attorney General
State of Arizona

MIKE BEEBE
Attorney General
State of Arkansas

JOHN W. SUTHERS
Attorney General
State of Colorado

CHARLES J. CRIST, JR.
Attorney General
State of Florida

MARK J. BENNETT
Attorney General
State of Hawaii

LISA MADIGAN
Attorney General
State of Illinois

MICHAEL A. COX
Attorney General
State of Michigan

MIKE MCGRATH
Attorney General
State of Montana

GEORGE J. CHANOS
Attorney General
State of Nevada

JIM PETRO
Attorney General
State of Ohio

HARDY MYERS
Attorney General
State of Oregon

HENRY D. MCMASTER
Attorney General
State of South Carolina

LAWRENCE E. LONG
Attorney General
State of South Dakota

GREG ABBOTT
Attorney General
State of Texas

ROBERT F. MCDONNELL
Attorney General
Commonwealth of Virginia

WILLIAM SORRELL
Attorney General
State of Vermont

PATRICK J. CRANK
Attorney General
State of Wyoming

QUESTIONS PRESENTED

1. Is the holding in *Blakely v. Washington* a new rule or is it dictated by *Apprendi v. New Jersey*?

2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

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INTEREST OF AMICI CURIAE

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court ruled that the "statutory maximum" sentence for *Apprendi* purposes is the maximum sentence that can be imposed solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. The question here is whether this rule from *Blakely* is retroactively applicable to cases on federal collateral review. The *amici* States have a substantial interest in the answer to this question.

The presumption that new rules of criminal procedure do not apply on federal habeas review protects the States's compelling interest in the finality of criminal convictions. *See Beard v. Banks* (*Banks II*), 542 U.S. 406, 412-13 (2004). Otherwise, "the application of new rules to cases on collateral review ... [would] continually force[] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague v. Lane*, 489 U.S. 288, 310 (1989) (opinion of O'Connor, J.).

If *Blakely* is applied retroactively, the *amici* States will see immediate and far-reaching effects on their criminal justice systems. Retroactivity would potentially open a staggering and immeasurable number of sentences to collateral attack in both state and federal courts. Relitigating these presumptively valid and long-final sentences on collateral review would require the *amici* States to undertake a massive realignment of resources and priorities of their judicial, prosecutorial, public defender, and correctional agencies. For these reasons and those explained below, the

amici States urge the Court to affirm the judgment of the court of appeals.

SUMMARY OF THE ARGUMENT

Blakely v. Washington, 542 U.S. 296 (2004), announced a new rule of criminal procedure that is not retroactively applicable on collateral review pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). While dicta in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), may have supported the rule eventually announced in *Blakely*, it did not dictate *Blakely*'s outcome. Indeed, at the time of the state court decision at issue here, only one state court had read *Apprendi* as expansively as the Court eventually did in *Blakely*. Moreover, every circuit had held that the term "statutory maximum" meant the maximum sentence allowed under the relevant statute and not, as *Blakely* later clarified, the maximum sentence that could be imposed without any additional factual findings. Even a near-majority of this Court believed that *Apprendi* did not command the *Blakely* rule. Given that landscape, it cannot be said that the *Blakely* rule was an "old rule" for retroactivity purposes.

Nor did *Blakely* establish a watershed rule. First, *Blakely* does not seriously diminish the likelihood of reaching an accurate sentence, as illustrated by the Court's recent holdings that *Apprendi* and *Blakely* errors are subject to procedural default and harmless error analysis. Errors that do not warrant automatic reversal simply do not "seriously diminish" the truth-finding function of a jury trial. Second, *Blakely* does not alter our understanding of a fair trial. Unlike *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Blakely* rule did not establish a new right that changes our view of fairness. Rather, it marks the latest installment in a lengthy and graduated development of this area of constitutional law.

Nothing in this new rule is so groundbreaking as to be properly characterized as watershed.

Finally, Burton is not entitled to habeas relief because *Blakely* was not "clearly established" law at the time the Washington courts addressed his claim. The Court has made clear that the *Teague* analysis is distinct from the statutory standard for habeas relief found in 28 U.S.C. § 2254(d)(1). When the state courts adjudicated this claim, nothing in the Court's "holdings, as opposed to the dicta," *see Williams v. Taylor*, 529 U.S. 362, 412 (2000), clearly established the rule Burton now invokes. Habeas corpus relief is therefore unavailable here regardless of whether *Blakely* is retroactive.

ARGUMENT

I. *Blakely* announced a new rule of criminal procedure

As a general matter, "new rules will not be applied or announced in cases on collateral review unless they fall into one of [the] two exceptions" set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989), *overruled on other grounds, Atkins v. Virginia*, 536 U.S. 304 (2003). *Blakely* announced a *Teague*-barred new rule by giving a definition to the term "statutory maximum" that was not dictated by precedent. Prior to *Blakely*, lower courts acting reasonably and in good faith could have understood "statutory maximum" in a way that permitted judges to decide factors permitting certain sentence enhancements. Such decisions should not be subject to collateral attack.

1. Generally, a rule is new if "it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301 (opinion of

O'Connor, J.)[1]. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* Here, Burton relies principally on the Court's statement in *Blakely* that "[o]ur precedents make clear ... that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303. The Court's view that a particular question is answered by prior cases, however, does not mean its decision merely applies an old rule. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

To be sure, it can often be difficult "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Penry*, 492 U.S. at 314 (*quoting Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). *See also Butler*, 494 U.S. at 412-13 ("In the vast majority of cases, however, where the new decision is reached by an extension of the reasoning of previous cases, the inquiry will be more difficult."). Such difficulties are resolved by reference to the underlying purposes of federal habeas corpus review. *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (*citing Butler*, 494 U.S. at 412-14). "Foremost among these is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings." *Id. Teague*'s new-rule principle "therefore validates reasonable, good faith interpretations of existing precedents made by state courts even though they are later shown to be contrary to later decisions." *Id.*

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[1] All further citations to *Teague* are to Justice O'Connor's plurality opinion.

In other words, *Teague* protects reasonable, good-faith interpretations of the Court's precedents by the lower courts, even if those courts are later found to have been wrong. *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Thus, a rule is effectively "new" unless lower courts on direct review acted "objectively unreasonably by not extending the relief later sought" on collateral review. *Id.*

2. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), ruled that criminal defendants are entitled to have a jury decide facts (other than prior convictions) that could lead to a sentence "beyond the statutory maximum." *Apprendi*, 530 U.S. at 483. In that case, a defendant pleaded guilty to a second-degree firearm offense, but the trial court found that the crime was motivated by racial bias and applied a hate-crime sentencing enhancement. *Id.* at 470-71. As a result, the defendant received a sentence higher than what was otherwise statutorily allowed for his level of offense. In passing, the Court happened to suggest that this rule would apply to facts that, if true, would lead to a sentence exceeding "the maximum [the defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 483.

Lower courts in 2001 understood *Apprendi* to mean that "statutory maximum" was the maximum sentence allowed under the relevant statute and not, as *Blakely v. Washington*, 542 U.S. 296 (2004), later clarified, the maximum sentence that could be imposed on the basis of the jury's verdict alone, *i.e.*, without additional factual findings. 542 U.S. at 303. As observed by the *Blakely* dissenters, all 12 circuits and at least four states had rejected the application of *Apprendi* to guideline sentencing schemes. *Id.* at 320 n. 1 (O'Connor, J., dissenting) (compiling cases). Prior to *Blakely*, only the Kansas Supreme Court had concluded that *Apprendi* applies

to sentences within the maximum statutory range for a particular offense. *State v. Gould*, 23 P.3d 801 (Kan. 2001).

With this background in mind, it is important to remember that *Teague*'s definition of a new rule includes a "rule that replaces palpable uncertainty as to what the rule might be." *Penry*, 492 U.S. at 352 (Scalia, J., concurring in part and dissenting in part). Not until *Blakely* was it obvious that a statement not essential to the *Apprendi* holding was so critically important. *See also Washington v. Recuenco*, 126 S. Ct. 2546, 2549 (2006) (*Blakely* "clarified" the meaning of "statutory maximum"). The "simple and logical difference" between the "precise holding" of *Apprendi* and the later meaning given to "statutory maximum" in *Blakely* qualifies the *Blakely* rule as a new one. *Saffle*, 510 U.S. at 490.

Moreover, the 5-4 margin and range of opinions expressed in *Blakely* further demonstrate that the lower-court debate over "statutory maximum" was reasonable. *O'Dell*, 521 U.S. at 159-60. *See also Beard v. Banks* (*Banks II*), 542 U.S. 406, 415-16 (2004). Although the answer in *Blakely* may have been "clear" to a majority of this Court, *Apprendi* was "susceptible to debate among reasonable minds" and "[i]t would not have been illogical or even a grudging application" of *Apprendi* "to decide that it did not extend" to *Blakely*. *Butler*, 494 U.S. at 415. Because the unlawfulness of Blakely's sentence was not "apparent to all reasonable jurists," *Blakely* announced a new rule of criminal procedure. *Banks II*, 542 U.S. at 413 (*quoting Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

3. *Blakely* is not the first case to announce a rule that is not retroactive despite being compelled by prior cases. In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court held that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation. 486 U.S. at 682. The Court found its

decision to be compelled by *Edwards v. Arizona*, 451 U.S. 477 (1981), which held that police must refrain from further questioning during continuous custody once the suspect invokes his right to counsel on any offense. *Roberson*, 486 U.S. at 677-78. The Court later ruled that *Roberson* announced a new rule, *Butler*, 494 U.S. at 415, and in so doing acknowledged that it frequently views cases as being "controlled" or "governed" by prior cases "even when aware of reasonable contrary conclusions reached by other courts." *Id.* Additionally, many state courts, as well as the Fourth and Seventh Circuits, had disagreed over whether *Edwards* required police to refrain from questioning a defendant about a crime where the defendant has retained counsel on another charge. *Id.* at 410-11, 415 & n.3. Accordingly, *Teague* required the *Roberson* decision to be classified as a "new rule" for retroactivity purposes. *Id.* at 415.

The Court also refused to apply retroactively *Bullington v. Missouri*, 451 U.S. 430 (1981), which held that the Double Jeopardy Clause barred a second capital sentencing proceeding after the first jury had refused to impose the death penalty. The decision not to apply *Bullington* retroactively turned in large part on disagreements among lower courts about *Bullington*'s application to non-capital sentencing proceedings. *Caspari v. Bohlen*, 510 U.S. 383, 393-95 (1994) (observing that the Tenth Circuit, Indiana Supreme Court, New York Court of Appeals, and Missouri Court of Appeals had all held that the *Bullington* did not apply beyond capital sentencing while the Fifth Circuit, Washington Supreme Court, and Texas Court of Criminal Appeals had held to the contrary). *Id.* at 393-94.

Here, by comparison, the *Blakely* definition of "statutory maximum" was not dictated by *Apprendi*, every circuit had so held, and *Blakely* itself carried only a bare majority of the Court. It follows that lower court rulings contrary to *Blakely* were reasonable, that *Blakely* therefore announced a new rule

for *Teague* purposes, and that *Blakely* can be applied retroactively only if it announced a watershed rule of criminal procedure.[2]

II. *Blakely* is not a watershed rule

Under *Teague*, a new rule may apply retroactively on collateral review if it is a "watershed rule" that implicates the fundamental fairness and accuracy of the criminal proceeding. To be a "watershed rule," the new rule "must meet two requirements: [i]nfringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,' and the rule must 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding. *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (*quoting Sawyer v. Smith*, 497 U.S. 227, 242 (1990), and *Teague*, 489 U.S. at 311). *Blakely* does not seriously enhance the likelihood of accurately sentencing a defendant and is not one of the "small core of rules," *Graham v. Collins*, 506 U.S. 461, 478 (1993), that mark a "groundbreaking occurrence," *Caspari*, 510 U.S. at 396, in our understanding of a fair trial. As such, *Blakely* is not a watershed, retroactive rule

A. *Blakely* error does not seriously diminish accuracy

1. Last term, the Court held that *Blakely* error is not "structural" and can be harmless. *Recuenco*, 126 S. Ct. at 2553. If an error does not "necessarily render a criminal trial fundamentally unfair or an *unreliable* vehicle for determining

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[2] Burton does not argue that *Blakely* is a substantive rule, the first exception to the *Teague* non-retroactivity doctrine. Nor can he. *See Schriro v. Summerlin*, 542 U.S. 348, 353-55 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), which applied *Apprendi* to capital cases, did not establish a substantive rule).

guilt or innocence," *id.* at 2551 (*quoting Neder v. United States*, 527 U.S. 1, 9 (1999)) (emphasis added), it is difficult to say that it nonetheless "seriously diminish[es] the likelihood of obtaining an *accurate* conviction." *Teague*, 489 U.S. at 311 (emphasis added). "Accuracy" and "reliability" are obviously closely related—if not identical—concepts.

Blakely's new rule, the definition of a "statutory maximum" sentence, in no way implicates those concerns. Indeed, any definition that the Court could have settled upon would not have enhanced or effected in any way the *accuracy* of sentencing proceedings. Burton ignores this and instead focuses his analysis on the *Blakely* Court's reaffirmation of the *Apprendi* rule. But *Neder* and *Recuenco* illustrate how that rule does not significantly enhance accuracy, either.

In *Neder*, the Court held that the failure to submit an element of an offense to the jury for proof beyond a reasonable doubt is not a structural error. 527 U.S. at 9. In *Recuenco*, the prosecution failed to submit the fact that the defendant was armed with a firearm, a fact that increased the range of available sentences. 126 S. Ct. at 2549. The "only difference" between the error in *Neder* and the error in *Recuenco* is that in *Neder* the prosecution failed to prove an *element of the offense* to the jury beyond a reasonable doubt while in *Recuenco* the prosecution failed to prove a *sentencing factor* to the jury beyond a reasonable doubt. *Id.* at 2552. That distinction lacks any constitutional significance. *Id.* If, despite constitutional error, a trial is sufficiently reliable to determine guilt, it follows that the error cannot have "seriously diminish[ed]" the accuracy of the conviction or sentence.

2. Similarly, it is also significant that *Apprendi* errors in federal criminal prosecutions are subject to the plain error rule. *United States v. Cotton*, 535 U.S. 625, 632-33 (2002). The Court ruled in *Cotton* that the failure to prove a drug

quantity leading to an enhanced sentence did not seriously affect the "fairness, integrity, and public reputation of judicial proceedings." *Id.* Rather, the Court said that the real danger to the "fairness, integrity, and public reputation of judicial proceedings" would be to reduce a defendant's sentence despite overwhelming and uncontroverted evidence of his involvement in a vast drug conspiracy. *Id.* at 634. Such treatment further undermines the argument that *Blakely* seriously enhances the accuracy of sentences. If these errors did in fact "seriously diminish the likelihood of obtaining an accurate conviction," certainly the errors would have been deemed by the Court to be sufficiently "plain" to warrant reversal.

3. It would be illogical to excuse the errors in *Neder*, *Recuenco*, and *Cotton* through procedural default and harmless error analysis, yet reopen potentially hundreds of thousands of conclusively final state and federal convictions based on nothing more serious. This is not to say that the burden of proof requirement lacks any effect on the accuracy of convictions and enhanced sentences. But a watershed rule must *seriously diminish* accuracy. It is difficult to see how the accuracy of decades worth of presumptively valid state and federal sentences were seriously diminished in the absence of the new *Apprendi* and *Blakely* rules.

B. *Blakely* does not alter our understanding of a fair trial

1. Aside from whether the reasonable doubt standard seriously enhances accuracy, *Blakely* did not "alter our understanding of the bedrock procedural elements necessary for a fair trial." *Tyler*, 533 U.S. at 665 (internal quotation marks, citation, and emphasis omitted). Any such "bedrock" procedures must be "so central to an accurate determination of innocence or guilt ... it is unlikely that any have yet to emerge" since the Court's decision in *Gideon v. Wainwright*,

372 U.S. 335 (1963). *Id.*; *see also Banks II*, 542 U.S. at 417. Whatever its merits, the *Blakely* understanding of "statutory maximum" lacks all of these characteristics.

The same is true for the beyond-a-reasonable-doubt standard upon which Burton focuses. Unlike *Gideon*, *Apprendi* and *Blakely applied in a new context*, but did not *create*, an important rule: the long-standing principle of proof beyond a reasonable doubt. Long before *Apprendi*, the Court had made clear that proof beyond a reasonable doubt on all elements of the offense was a command of the Fifth, Sixth, and Fourteenth Amendments. *See In re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Indeed, *Winship*, which applied the beyond-a-reasonable-doubt standard to juvenile delinquency proceedings, did not create the rule but rather built upon the foundation laid in the early years of the Republic. *Winship*, 397 U.S. at 361-62 (compiling authorities). *See also Apprendi*, 530 U.S. at 478 (summarizing same).

Apprendi further expanded the rule to include facts that had relatively recently become known as "sentencing factors" that were used to enhance a sentence "beyond the statutory maximum." 530 U.S. at 490. *Blakely*, in turn, broadened our understanding of the scope of this rule even further to define "statutory maximum" as including any fact (other than prior convictions) that is necessary to impose a greater sentence. 542 U.S. at 303-04.

These decisions clarify the circumstances where the right to a jury trial and the reasonable-doubt standard apply and represent nothing more than the most recent installment in the

graduated development of this area of constitutional law. Thus, *Apprendi* and *Blakely* are not "groundbreaking," *Caspari*, 510 U.S. at 396, and lack the "primacy and centrality," *Saffle*, 494 U.S. at 495, of rules like *Gideon* that "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 242 (*quoting Teague*, 489 U.S. at 311).

2. With *Gideon* as the standard, "[l]ess sweeping and fundamental rules do not fall" within *Teague*'s watershed rule exception. *Banks II*, 542 U.S. at 418-19 (discussing examples). Truly "watershed" rules "are best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313 (citations and internal quotation marks omitted). Whatever rules might qualify, they will be among "a small core of rules" that have those central purposes of habeas corpus at their heart. *Id.* While the rules of *Apprendi* and *Blakely* are important, they did not, for example, establish the time-honored principles of a jury trial or the prosecution's burden of proof.

3. Indeed, *Apprendi* and *Blakely* errors are not even structural, but instead may be procedurally defaulted and are subject to plain error review. These characteristics are inconsistent with being so fundamental as to change the entire foundation of criminal due process. It can hardly be contested that, to be deemed "watershed," a rule must first be structural, though not even all errors mandating automatic reversal are applied retroactively. *Tyler*, 533 U.S. at 666-67. Indeed, although the Court has identified several structural errors, see *Recuenco*, 126 S. Ct. at 2551 n.2 (compiling cases), only one—the denial of counsel under *Gideon*—involves a "watershed" rule. "Nor can it be said that all new

rules relating to due process (or even the 'fundamental requirements of due process')" are retroactive. *Tyler*, 533 U.S. at 667 n.7 (citations omitted).

If rules considered to be so fundamental that they require mandatory reversal are not automatically "watershed," then decisions such as *Apprendi* and *Blakely*, which require a showing of prejudice before reversal, are even less appropriate for retroactive application. Simply put, a fair trial is not impossible without *Apprendi* and *Blakely*. *Cf. Gideon*, 372 U.S. at 344-45 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, *cannot be assured a fair trial* unless counsel is provided for him." (emphasis added)). These decisions, therefore, did not articulate a "watershed" rule.

III. Habeas relief is otherwise unavailable to Burton under the AEDPA

Regardless whether *Blakely* is retroactive, the Court should affirm the judgment on the grounds that *Blakely*'s definition of "statutory maximum" was not "clearly established federal law" at the time the Washington state courts adjudicated Burton's *Apprendi* claim. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court "shall not" grant a writ of habeas corpus unless the state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law*, as determined" by the Court. 28 U.S.C. § 2254(d)(1) (emphasis added); *Williams v. Taylor*, 529 U.S. 362, 402-03 (2000). *Blakely* was decided nearly four years after the Washington Court of Appeals adjudicated Burton's claim. *Blakely* plainly was not "clearly established federal law" at that time, so habeas relief cannot be granted under § 2254(d)(1).

1. Burton may argue that § 2254(d)(1) incorporated the *Teague* non-retroactivity analysis such that additional review of whether *Blakely* constituted "clearly established federal law" is unnecessary. *See, e.g., Bockting v. Bayer*, 399 F.3d 1010, 1021 (9th Cir. 2005), *reh'g denied*, 408 F.3d 1127, *cert. granted sub nom. Whorton v. Bockting*, 126 S. Ct. 2017 (2006). Such an interpretation of § 2254(d)(1) would be incorrect.

The Court has recognized that the inquiries under § 2254(d)(1) and *Teague* are "distinct." *Horn v. Banks* (*Banks I*), 536 U.S. 266, 272 (2002) (per curiam). The first distinction is temporal: under § 2254(d)(1), the applicable precedent is that which existed at the time of the state court adjudication, whether on direct *or* state post-conviction review, *Lockyer v. Andrade*, 538 U.S. 63, 71, 72 (2003), while *Teague* focuses on precedent as of the date that the habeas petitioner's conviction became final on direct review, *Banks II*, 542 U.S. at 413. "In this respect, the 'clearly established Federal law' phrase bears only a slight connection to [the Court's] *Teague* jurisprudence." *Williams*, 529 U.S. at 412. Second, § 2254(d)(1) limits the source of the applicable law to the Court's precedent and not that of other courts; *Teague* has no such requirement. *Id.* Third, *Teague* provides two exceptions to its non-retroactivity principle while § 2254(d)(1) does not. The statute precludes habeas relief if the law was not "clearly established," with no exceptions for the importance of the new law. *Id.*

Accordingly, § 2254(d)(1) precludes the application of any "new rule," regardless whether it is retroactive under *Teague*. If Congress had intended for federal courts to consider under § 2254(d)(1) new rules subject to retroactive application, it would have structured that section much as it did the successive petitions and statute of limitations provisions of 28 U.S.C. § 2244(b)(2)(A) and (d)(1)(C), and

the evidentiary hearing provision of § 2254(e)(2)(A), using phrases like "new rule of constitutional law" and "made retroactive to cases on collateral review." *See also* 28 U.S.C. § 2264(a)(2) (allowing habeas review in qualifying capital cases where "Supreme Court's recognition of a new Federal right that is made retroactively applicable"). *Cf. Duncan v. Walker*, 533 U.S. 167, 172 (2001) (a comparison of 28 U.S.C. § 2244(d)(2) to other AEDPA provisions supplies "strong evidence" that Congress intended to exclude federal collateral review from the tolling provision of the statute of limitations).

2. In Burton's case, the rule announced in *Blakely* was not "clearly established" at the time that the Washington Court of Appeals adjudicated his claim in 2001. Clearly established law "refers to the holdings, as opposed to the dicta, of this Court's decisions." *Williams*, 529 U.S. at 412; *see also Kane v. Garcia Espitia*, 126 S. Ct. 407, 408 (2005) (rules inferred from the Court's precedents cannot form a basis for habeas relief). As Justices Breyer and O'Connor outlined in their *Blakely* dissents, *Apprendi* did not require the Court to have announced the rule it did. *Blakely*, 542 U.S. at 346 (Breyer, J., dissenting) ("Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts."); *id.* at 320 n.1 (O'Connor, J., dissenting) ("there is no map of the uncharted territory blazed by today's holding"). No circuit believed that *Apprendi* clearly applied to facts used to determine a sentence within the maximum range allowed by statute, and only one state court of last resort had read *Apprendi* in that fashion. Given the wide disagreement among members of this Court and jurists across the country about the scope of the *Apprendi* rule, it did not "clearly establish" the rule later announced in *Blakely* and habeas relief cannot now be based on it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief

**Counsel of Record* *Counsel for Amici Curiae*

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In The Supreme Court of the United States

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

PAMELA HARRIS
National Association of Criminal Defense Lawyers
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

SUZANNE ELLIOTT
Washington Association of Criminal Defense Lawyers
705 Second Ave.,
1300 Hoge Bldg.
Seattle, WA 98104
(206) 623-0291

SHERYL GORDON MCCLOUD
Counsel of Record
National Association of Criminal Defense Lawyers
1301 Fifth Ave., Suite 3401
Seattle, WA 98101
(206) 224-8777

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question presented in petitioner Lonnie L. Burton's petition for writ of certiorari is:

> Mr. Burton was given an exceptional sentence of 258 months above the 304 month ceiling of the statutory sentencing range, and this Washington state sentence became final after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but before *Blakely v. Washington*, 542 U.S. 296 (2004).
>
> 1. Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?
>
> 2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

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Sentencing Guidelines Commission, State of Washington, Statistical Summary of Adult Felony Sentencing, Fiscal Year 2004, *available at* http://www.sgc.wa.gov/PUBS/statistical_summaries/fy2004_statistical_summary.pdf 14

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. The Washington Association of Criminal Defense Lawyers (WACDL) is a non-profit corporation organized in 1987, and it has over 960 criminal defense lawyer members in the state of Washington. It is a state affiliate of NACDL.

NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights, including the right to a trial by jury at issue in this case, and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in all manner of cases concerning substantive criminal law and criminal procedure, including *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, has made any monetary contribution to its preparation or submission. See Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

We agree with petitioner Mr. Burton that *Blakely* did not announce a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), but instead applied the constitutional rule announced four years earlier in *Apprendi*. But if *Blakely* or *Apprendi* did announce a new rule, it must be considered a new rule with retroactive effect under *Teague*. This brief focuses on one aspect of that retroactivity analysis: whether *Apprendi* or *Blakely* created a "watershed" rule of criminal procedure that is exempt from the *Teague v. Lane*, 489 U.S. 288, 310-12, bar on retroactive application.

To constitute a watershed change within the meaning of *Teague*, the new rule of criminal procedure must go to the heart of the accuracy of the guilt/innocence determination. Since *Apprendi* and *Blakely* both require that a defendant must be proven guilty by the traditional beyond-a-reasonable-doubt standard prior to punishment, it neatly fits into that category. Argument Section I.(A).

Some courts have rejected this conclusion, because they treat *Apprendi* and *Blakely* as decisions affecting sentencing rather than guilt. But those courts have fallen into the same formalism that plagued the New Jersey Supreme Court in *Apprendi* and the Washington Supreme Court in *Blakely*: they treat the "fact that increases the penalty for a crime beyond the prescribed statutory maximum" as a sentencing factor because state law allocated it to the sentencing court, instead of treating it as a trial factor because federal constitutional law allocates it "to a jury, [to be] ... proved beyond a reasonable doubt." The federal constitutional characterization must trump the inaccurate state statutory characterization. Argument Section I(B).

When we look at the facts upon which *Apprendi* and *Blakely* operate – that is, the facts that were previously determined by a judge at sentencing by the preponderance of

evidence standard under state Guidelines' sentencing statutes – we find that in many Washington state cases, these were facts of other, additional, uncharged crimes, that the state could not prove beyond a reasonable doubt. These are quintessential examples of guilt-phase, not sentencing-phase, issues. In addition, we find Washington cases in which the difference between the preponderance and beyond-a-reasonable-doubt standards of proof would have been outcome determinative. These are quintessential examples of how the change in the burden of proof goes to the heart of the accuracy of the determination of innocence or guilt. Argument Section I(C).

One of the central purposes of the writ is to ensure that the innocent are not convicted and punished. *Blakely* and *Apprendi* further this core purpose. Applying the burden-of-proof holdings of those cases retroactively will therefore bolster the core purposes of the writ, not expand its traditional scope of operation. Section II.

ARGUMENT

I. THE *APPRENDI/BLAKELY* BURDEN OF PROOF HOLDING IS A "WATERSHED" CHANGE IN THE LAW BECAUSE IT BEARS SO DIRECTLY ON THE QUESTION OF GUILT OR INNOCENCE

A. "Watershed" Rules of Criminal Procedure Must Be Central to an Accurate Determination of Innocence or Guilt, and a Rule Requiring Use of the Beyond-a-Reasonable-Doubt Standard Is

In *Teague v. Lane*, 489 U.S. 288, 311-12, this Court held that new rules of criminal procedure are not applicable to cases that became final before the rule is announced unless

the rule decriminalizes certain conduct or prohibits the imposition of certain types of punishment for a class of defendants, or constitutes a "watershed" rule of criminal procedure.

We concern ourselves here with the "watershed" exception. It is designed for that class of new rules that (1) "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction"[2] and (2) go to the heart of the accuracy of the guilt/innocence determination, that is, rules that "implicate the fundamental fairness of the trial."[3]

Thus, this Court defines the sorts of procedural rules falling within the "accuracy" prong of this definition, and implicating the guilt-innocence determination sufficiently to fit within *Teague*'s "watershed" exception, as follows:

> The second exception permits federal courts on collateral review to announce "'watershed rules of criminal procedure' *implicating the fundamental fairness and accuracy* of the criminal proceeding." Whatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring "observance of 'those procedures that ... are "implicit in the concept of ordered liberty."'"

Graham v. Collins, 506 U.S. 461, 478 (1993) (citing *Teague* and other decisions of this Court) (emphasis added).

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[2] *Teague*, 489 U.S. at 311 (citation omitted) (emphasis in *Teague*).

[3] *Teague*, 489 U.S. at 312.

Decisions fitting within this exception will therefore "implicate the fundamental fairness and accuracy of the criminal proceeding." They will be "central to an accurate determination of innocence or guilt." *Id.*

Since *Apprendi* and *Blakely* both require that a defendant be proven guilty by the traditional beyond-a-reasonable-doubt standard prior to punishment, they neatly fit within that category. This Court has explicitly held that use of the beyond-a-reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error"; that it "provides concrete substance for the presumption of innocence"; and that it would be fundamentally unfair for someone to be "imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship,* 397 U.S. 358, 363 (1970).

B. Treating *Apprendi* and *Blakely* as Bearing Solely on Sentencing Allows the Inaccurate State Law Characterization of the Sentence-Changing Fact to Trump the Federal Constitutional Characterization of that Fact

The government has argued, in a similar context, that *Booker*[4] does not fall within the "watershed" exception because it concerns sentencing, not the guilt innocence determination at trial. *E.g. Regaldo v. United States*, 334 F.3d 520, 527 (6th Cir.), *cert. denied,* 540 U.S. 1024 (2003) (accepting this argument).

But that is not an accurate description of *Apprendi* or *Blakely*. Those decisions did challenge procedures used at sentencing. But the challenge raised – and accepted – in each of those cases was that the particular fact at issue should not have been determined at a sentencing proceeding at all. It

[4] *United States v. Booker*, 543 U.S. 220 (2005).

should have been determined in a trial-like proceeding, with trial-like protections.

Thus, characterizing *Apprendi* and *Blakely* as limited to sentencing misses the point of those decisions. It is true that the defendants in those cases challenged sentencing proceedings. But they won – and hence they established the rule that "any fact" used to increase sentence over a statutory maximum must be treated as a trial-like factor, to be determined by the jury beyond a reasonable doubt, not at sentencing. *See Lloyd v. United States,* 407 F.3d 608, 614-15 (3rd Cir. 2005) ("*Summerlin*[5] leaves little doubt that the 'watershed rule' exception can apply to a procedural rule that only affects sentencing; indeed, were it otherwise, the Court would not have needed to examine whether *Ring*'s[6] holding applied retroactively. More importantly, *Apprendi* and its progeny have made clear that distinguishing between a conviction and a sentence obscures what matters for constitutional purposes – namely, facts that increase a defendant's punishment. ... Accordingly, while the *Summerlin* Court held that *Ring* does not apply retroactively, it did not do so because *Ring* merely affected sentencing decisions.").

We are therefore left with the question of whether *Winship*'s characterization of the centrality of the beyond-a-reasonable doubt standard to accuracy remains correct. Do either *Apprendi* or *Blakely* increase significantly the accuracy of the guilt/innocence determination; does either one "implicate the fundamental fairness and accuracy of the criminal proceeding" in a way that is "central to an accurate determination of innocence or guilt"?

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[5] *Schriro v. Summerlin,* 542 U.S. 348 (2004).

[6] *Ring v. Arizona,* 536 U.S. 584 (2002).

C. The Types of "Facts" On Which *Apprendi* and *Blakely* Operate Include Findings of Guilt of Other, Uncharged, Crimes; These Are Quintessential Guilt-Phase Issues That Go to the Accuracy of the Innocence or Guilt Decision

One way to answer this question is to look at the accuracy of the determination of the existence of exceptional sentencing factors that have increased the statutory maximum sentence available under mandatory, statutory, state Guidelines sentencing hearings, before *Blakely*. In other words, have there been defendants who received sentences above a state statutory Guidelines maximum based on factors that the state could prove by the lesser, preponderance of evidence standard, but could not prove beyond a reasonable doubt?[7] *Cf. United States v. Watts*, 519 U.S. 148 (1997) (pre-*Apprendi* holding that at sentencing, court may consider conduct of which defendant has been acquitted, if it is proven by preponderance of evidence).

1. Schardt v. Payne[8] is the Paradigm Example Because the State Conceded Inability to Prove Guilt of Other, Uncharged Crimes, Beyond a Reasonable Doubt

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[7] The question presented here thus differs from the question addressed in *Schriro v. Summerlin*, 542 U.S. 348, 355-56. In that case, this Court rejected the claim that *Ring v. Arizona*, 536 U.S. 584, was a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, because judicial factfinding could not be said to "*seriously* diminish[] accuracy." (Emphasis in *Schriro.*) Here, we deal with whether a higher burden of proof (rather than a different factfinder) affects accuracy.

[8] *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005), *cert. petition filed*, Nov. 10, 2005 (No. 05-9237).

The decision in *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005), provides a striking example of just such an increase in sentence, above the Guidelines maximum, based on other, current, uncharged, crimes, which the state *admitted* that it could not prove beyond a reasonable doubt. The nature of the burden of proof as substantive, and in fact outcome-determinative, is particularly clear from the *Schardt* case – because the upward departure factor there was the existence of additional current crimes that were not proven to the jury, and because the state explicitly acknowledged on the record at the time of sentencing that it would have been unable to prove those additional current crimes by the beyond a reasonable doubt standard at trial and hence was forced to do it by the preponderance of evidence standard, instead.

In the *Schardt* case, the trial court instructed the jury that it could convict of the single charged crime if it agreed that a single rape occurred:

> There are allegations that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant, *one or more particular acts must be proved* beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Schardt, 414 F.3d at 1028-29.

Then at sentencing, the state sought an exceptional sentence, stating that it sought to impose punishment for additional crimes that were not proven at trial:

> The State seeks an exceptional sentence of 204 months on the basis that the defendant, for a period of more than one year, continuously, habitually, and systematically engaged B.E., his surrogate stepdaughter, in a deliberate, calculated pattern of sexual abuse.

State's Sentencing Memorandum, App. 1.

Critically, the state admitted that *it could not prove such crimes at a trial*:

> In the instant case, for B.E., there are few separately identifiable incidents of abuse that can be plotted on the calendar with any real sequential or chronological accuracy, rather the acts of sexual assault committed against her may best be characterized as an indistinguishable blur. She cannot sort through the many, many trips into the defendant's bedroom, or he into hers, or the two of them together in the living room on the couch ...; the memories have become tangled, blended, disordered.

Id., App. 2.

The state even acknowledged its inability to prove such crimes by the required, beyond a reasonable doubt, standard:

> As argued to the jury, the lone count charged was merely representative of the nature and scope of the defendant's victimization of B.E. Charging the defendant with each separate crime of rape or molest [sic] committed against B.E. would have been impractical and *would have presented, because of B.E.'s inability to*

> *sufficiently distinguish chronologically between episodes of abuse, significant proof problems at trial.*

Id., App. 3 (emphasis added).

The Superior Court accepted the state's request to impose an exceptional sentence above the standard range despite the state's admitted "significant proof problems at trial" with trying to prove that these acts occurred. The court imposed a sentence of 204 months, double the high end of the standard range. The trial court's findings show that this exceptional sentence was based squarely on the existence of multiple criminal acts, which the state acknowledged it could not prove at trial:

> 1. The defendant was victim B.E.'s surrogate stepfather and/or father-figure and was one of two primary custodial parents *during the entire span of time the offenses were committed.*
>
> 2. The offenses were committed against B.E. *over an approximately one year period when B.E. was between the ages of 10 years and 11 years old.*

Schardt, 414 F.3d at 1029 (emphasis added).

Gideon[9] might not have changed the outcome in *all* cases that were tried without a defense lawyer. But what made *Gideon* a watershed rule is the fact that it was a change in a "bedrock procedural element," and it held the potential for greatly increasing the accuracy of the guilt/innocence determination in most cases. *Apprendi* and *Blakely* might not change the outcome in all cases in which uncharged sentencing factors were determined by a preponderance of

[9] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

the evidence, rather than beyond a reasonable doubt. But as even the state admitted, *Apprendi* and *Blakely* would definitely have changed the outcome *Schardt v. Payne.* It would have prevented a man who was convicted of a single crime, from receiving a greatly enhanced sentence above the statutory Guidelines sentencing maximum, because of other uncharged crimes.

Thus, when this Court decides whether *Apprendi* or *Blakely* are watershed decisions, it could keep in mind the fact that in some cases they would have completely changed the outcome. And they would have changed the outcome not because of a procedural detail, but because the state – with all of the evidence it could marshal, and none suppressed – still could not have proved its case.

2. *Schardt is Not an Isolated Example*

In Washington, the same sorts of exceptional sentences, above the standard range, have been imposed based on the same type and amount of evidence as in *Schardt v. Payne* for other, completely uncharged, crimes proven by only a preponderance of evidence. *E.g., State v. Xaviar*, 117 Wash. App. 196, 69 P.3d 901 (2003) (exceptional sentence of 480 months, twice the low end of the standard sentence range, imposed on defendant who pled guilty to sexual exploitation of a minor, first- and second-degree child rape, and first-degree child molestation, based in part on ongoing pattern of sexual abuse for other uncharged crimes to which defendant did not plead guilty; reversed for unrelated reason, *i.e.*, breach of plea bargain); *State v. Moreno*, 101 Wash. App. 1060, 2000 WL 11175681 (2000) (upholding trial court's consideration of "numerous uncharged acts of sexual abuse and child rape for the purpose of showing Moreno had a pattern of sexually abusing his daughter" as basis for exceptional sentence above standard range; reversing because

those facts were disputed and trial court failed to hold evidentiary hearing); *State v. Quigg*, 72 Wash. App. 828, 866 P.2d 655 (1994) (exceptional sentence above standard range upheld for uncharged crimes of sexual abuse of same victim on other occasions, different from those that the state charged and proved at trial, that is, two counts of first-degree rape of a child and two counts of child molestation); *State v. Brown*, 55 Wash. App. 738, 780 P.2d 880 (1989), *review denied*, 114 Wash.2d 1014, 791 P.2d 897 (1990) (upholding exceptional sentence above standard range for defendant "resident child molester" convicted of statutory rape and indecent liberties for additional uncharged crimes of the same sort under state statutory "multiple incidents" basis for exceptional sentence, specifically holding that this was proper where the other "multiple incidents" were different from the charged and proven crimes); *State v. Spisak*, 66 Wash. App. 813, 834 P.2d 57 (1992) (exceptional sentence above standard range upheld for future dangerousness, based upon disputed evidence of defendant's "'prior sexual misconduct,' including his numerous uncharged sexual offenses against children").

These results are not surprising, given that Washington statutes (pre-*Blakely*) permitted imposition of exceptional sentences above the Guidelines' statutory maximum based on just such uncharged crimes. State statutes did bar consideration of many uncharged crimes at sentencing, but explicitly allowed consideration of evidence at sentencing, by the then-applicable preponderance of evidence standard, tending to show that the "current offense involved multiple victims or multiple incidents per victim," former Wash. Rev. Code 9.94A.390(2)(d)(i), now Wash. Rev. Code 9.94A.535(3), or that "[t]he offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time." Former Wash. Rev. Code 9.94A.390(2)(g), now Wash. Rev. Code 9.94A.535(3);

former Wash. Rev. Code 9.94A.370(2), now Wash. Rev. Code 9.94A.530(2), (3).

It was not just uncharged sex crimes that could be presented, and proven, by the preponderance of evidence standard, at sentencing, to gain an exceptional sentence. It was also other crimes, including assault, psychological abuse and harassment. *E.g.*, *State v. Durall*, 116 Wash. App. 1059, 2003 WL 21000996 (2003) ("In considering an exceptional sentence, the trial court may consider whether the current offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. ... Psychological abuse alone can support an exceptional sentence. ... The trial court found that Durall subjected Carolyn to a pattern of psychological abuse that constituted domestic violence," exceptional sentence upheld); *State v. Van Buren*, 112 Wash. App. 585, 600-01, 49 P.3d 966, 973-74 (2002) (holding that state law bars sentencing court from increasing defendant's sentence above the standard range because of crimes "*wholly unrelated* to the current offense or facts that would elevate the degree of crime charged above that of the charged crime," but "the sentencing court may consider facts that establish elements of an additional uncharged crime when those facts are 'part and parcel' of the current offense"; hence facts of uncharged crime of assault preceding the death can be used to elevate sentence for murder above range) (emphasis in original); *State v. Tierney*, 74 Wash. App. 346, 872 P.2d 1145 (1994), *cert. denied*, 513 U.S. 1172 (1995) (sentencing court properly considered defendant's periodic harassment of victim over four years preceding the charged crimes of first-degree arson and residential burglary, as basis for exceptional sentence; "It is undisputed that the facts upon which the trial court relied to impose an exceptional sentence also constitute elements of other uncharged crimes.").

In fact, there are even Washington cases in which precisely the sort of additional criminal aggravating factor as the one present in *Apprendi* – racial animus – was used to support an exceptional sentence outside the standard range under Washington's Sentencing Reform Act. *State v. Spears*, 95 Wash. App. 1019, 1999 WL 239272 (1999), at ** 9-10 (racial animus against "Asians" and "Koreans" used to support exceptional sentence above standard range for murder and assault, despite the fact that malicious harassment based upon race is a separate and uncharged crime (Wash. Rev. Code 9A.36.080(1)), and despite the disputed nature of this racial animus factor at the evidentiary hearing, under the "exceptionally culpable mental state" aggravating factor).

These are all cases in which the state could not, or for some other reason did not, prove the additional, uncharged, crime by the beyond-a-reasonable-doubt standard. One is a case in which the state admitted that the outcome would have been different if the more demanding criminal standard of proof applied. *Schardt*, 414 F.3d 1025. In the other cases, we can only speculate on whether the state outcome might have been different at trial – just as we can only speculate about whether the presence of a lawyer might have made the outcome different at trial post-*Gideon*.

3. Still, Few Defendants Could Raise Such a Claim on Habeas

Still, the number of cases affected is not as drastic as it might seem at first glance. Several hundred people each year receive "exceptional" sentences outside the range in Washington.[10] That number, however, includes stipulated

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10 http://www.sgc.wa.gov/PUBS/statistical_summaries/statistic

exceptional sentences and downward departure sentences, neither of which would be implicated by a retroactivity decision in this case. In fact, the state has calculated the percentage of unstipulated, upward departure, exceptional sentences imposed each year in Washington at less than 0.6% of all sentencings, that is, between 100 and 200 per year.[11] Many of these are likely so old that the prisoners would not qualify for habeas relief under 28 U.S.C. § 2244(d)(i). All would be subject to other rules concerning the availability of habeas relief only for errors causing actual prejudice. *E.g., Brecht v. Abrahamson*, 507 U.S. 619 (2003) (habeas relief unavailable for constitutional violation unless the error had "substantial and injurous effect"). *See also Washington v. Recuenco*, __ U.S. __, 126 S.Ct. 2546 (2006) (*Blakely* error subject to harmless error review, not structural error requiring automatic reversal).

II. GIVEN THE WRIT'S IMPORTANCE IN PROTECTING THE INNOCENT AGAINST ERRONEOUS CONVICTION, DECISIONS FURTHERING THAT CORE PURPOSE ARE THE BEST CANDIDATES FOR RETROACTIVITY

One of the central purposes of the writ is to ensure against conviction and punishment of those who are innocent of committing the crime. *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("one of the 'principal functions of habeas corpus [is] "to assure that no man has been incarcerated

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al_summary_2005.pdf; http://www.sgc.wa.gov/PUBS/statistical_summaries/fy2004_statistical_summary.pdf.

[11] Brief of Respondent, *State v. Base*, Wash. S. Ct. No. 76081-1 (dated Feb. 3, 2005), pp. 10-11 (case pending before Washington Supreme Court).

under a procedure which creates an impermissibly large risk that the innocent will be convicted'"'"); *O'Neal v. McAninch*, 513 U.S. 432, 444 (1995) ("basic purposes underlying the writ" include correcting "the sort [of constitutional error] that risks an unreliable trial outcome and the consequent conviction of an innocent person"). *See also Schriro v. Summerlin*, 542 U.S. 348, 362 (Breyer, J., dissenting, joined by Stevens, Souther and Ginsberg, JJ.) ("Great Writ's basic objectives" including "protecting the innocent against erroneous conviction").

As this Court stated in *Schlup v. Delo*, 513 U.S. 298, 324-35 (1995), "the individual interest in avoiding injustice is most compelling in the context of actual innocence." This is, of course, based on the "fundamental principle that it is never just to punish a man or woman for an innocent act." *United States v. Barron*, 172 F.3d 1153, 1161 (9th Cir. 1999) (en banc) (28 U.S.C. § 2255 case). *Cf. Kansas v. Marsh*, __ U.S. __, 126 S.Ct. 2516, 2544 (2006) (Souter, J., dissenting) (requirement of "reasoned moral judgment" mandates heightened certainty of guilt before imposing death sentence).

Blakely and *Apprendi* further this core purpose and fundamental principle. Applying the burden-of-proof holdings of those cases retroactively will therefore bolster the core purposes of the writ, not expand its traditional operation.

This core purpose and fundamental principle animates not just substantive habeas decisions of this Court – *e.g.*, *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming without deciding that in capital case, "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief ..." – but also its procedural habeas decisions. In *House v. Bell*, ___ U.S. ___, 126 S.Ct.

2064, 2076-77 (2006), for example, this Court held that, under the actual innocence exception to the procedural bar rule, a habeas petitioner who claims actual innocence as a gateway to bring an otherwise defaulted claim must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Accord Schlup v. Delo*, 513 U.S. 298 (1995).

Thus, regardless of whether the standard of proof protection required by *Apprendi* and *Blakely* is characterized as procedural or substantive, it still implicates the guilt/innocence determination; it still goes to the fundamental fairness and accuracy of the process; and it still falls within the core concerns of federal habeas.

III. CONCLUSION

For all of the foregoing reasons, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

PAMELA HARRIS
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

SHERYL GORDON MCCLOUD
Counsel of Record
NATIONAL ASSOCIATION OF
OF CRIMINAL DEFENSE LAWYERS
1301 Fifth Ave., Suite 3401
Seattle, WA 98101
(206) 224-8777

SUZANNE ELLIOTT
WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
705 Second Ave., 1300 Hoge Bldg.
Seattle, WA 98104
(206) 623-0291

August 25, 2006

Attorneys for *Amici Curiae*

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Plaintiff, vs. SCHARDT, DALE E., Defendant.	) NO. 97-1-00768-7) STATE'S MEMORANDUM) IN SUPPORT OF) MOTION TO SENTENCE) DEFENDANT BEYOND) THE STANDARD RANGE)

ISSUE PRESENTED

The State seeks an exceptional sentence of 204 months on the basis that the defendant, for a period of more than one year, continuously, habitually, and systematically engaged B.E., his surrogate stepdaughter, in a deliberate, calculated pattern of sexual abuse.

RELEVANT FACTS

As the Court is familiar with the facts in this case having presided over the trial, they will not be repeated here in detail.

In the late Summer of 1995, B.E., along with her mother and younger brother, moved in with the defendant. The defendant thereafter assumed the role of step-parent. In fact, when interviewed by law enforcement the defendant described B.E. as his step-daughter. To the best of B.E.'s memory, the defendant began abusing her sexually in the Spring of 1996.

In her testimony at trial, 12 year-old B.E. detailed what it was like to have sexual contact with the defendant.

She described how it felt when he touched her vagina with his fingers, with his

* * *

(1990)." In *State v. Tierney,* 74 Wn.App. 346, 872 P.2d 1145, cert. denied 513 U.S. 1172 (1994), it was held that the "real facts" doctrine does not preclude reliance on facts that establish elements of additional uncharged crimes to enhance a sentence when those facts are part and parcel of the current offense, the doctrine only bars reliance on those facts wholly unrelated to the current offense or those facts that would elevate the degree of crime charged to a greater offense than that charged.

Additionally, the crimes constituting the pattern of abuse must be committed against the same victim. *State v. Collins,* 69 Wn.App. 110, 114, 847 P.2d 528, 531 (1993). Importantly, this factor applies even though the defendant was convicted on multiple counts, so long as there is proof of multiple acts of sexual abuse per count. *State v. Daniels,* at 564; *State v. Brown,* at 755-756. The inquiry for the court is whether record supports multiple incidents per count charged.

In the instant case, for B.E., there are few separately identifiable incidents of abuse that can be plotted on the calendar with any real sequential or chronological accuracy, rather the acts of sexual assault committed against her may best be characterized as an indistinguishable blur. She cannot sort through the many, many trips into the defendant's bedroom, or he into hers, or the two of them together in the living room on the couch, and successfully disconnect one episode from another; the memories have become tangled, blended, disordered. Like a ball of string whose tails are lost amongst the maze of over-lapping

lines, it is hard, very hard, for B.E. to separate the monotony of the middle from the terror that was the beginning and the relief that was the end.

As argued to the jury, the lone count charged was merely representative of the nature and scope of the defendant's victimization of B.E. Charging the defendant with each separate crime of rape or molest committed against B.E would have been impractical and would have presented, because of B.E.'s inability to sufficiently distinguish chronologically between episodes of abuse, significant proof problems at trial. However, as opined by the court in *Brown*, "these problems should not benefit the defendant at sentencing." *State v. Brown*, at 755.

CONCLUSION

For over a year rarely did a week go by where B.E. was not compelled to have sexual contact with the defendant at least once. Rarely did a week go by that this ten, then eleven-year-old, girl did not have to take her clothes off for the defendant so that he might use her body to service one or more of his sexually deviant needs. The multiple acts of sexual abuse committed against B.E. over this prolonged period of time are substantial and compelling reasons to impose an exceptional sentence. 204 months is proportionally consistent with the abuse the defendant visited upon this young girl. The State respectfully requests the court impose an exceptional sentence of 204 months.

Dated this 11th day of January 1999.

/s/ Michael C. Held
Michael C. Held, DPA #19696

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Supreme Court, U.S.
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In the Supreme Court of the United States

LONNIE LEE BURTON,

Petitioner,

v.

DOUGLAS WADDINGTON, SUPERINTENDENT,
STAFFORD CREEK CORRECTIONS CENTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW OFFICES OF ROBERT A. RATLIFF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT A. RATLIFF, ESQUIRE
(*Counsel of Record*)
LAW OFFICES OF ROBERT A. RATLIFF
713 DAUPHIN STREET
MOBILE, AL 36602
(251) 438-2250

Becker Gallagher Legal Publishing, Inc., 800.890.5001

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INTEREST OF AMICUS CURIAE[1]

The Law Offices of Robert A. Ratliff is a for profit professional organization actively engaged in the practice of law. The senior and founding partner is Robert A. Ratliff, a member of the Bar of this Supreme Court of the United States.

Robert Ratliff, by and through his law offices, is nationally recognized for professional representation in the areas of post conviction litigation and federal criminal defense. A tireless advocate of the constitutional rights of individuals, Mr. Ratliff has represented clients charged in criminal matters throughout the United States and overseas. At every opportunity, in the courtroom and before the appellate bars, in the classroom and in the community, Mr. Ratliff has fought for the unalienable rights of individuals.

The Law Offices of Robert A. Ratliff has a long-term interest in the selection and resolution of important criminal justice cases by this Court. In that regard, this brief will discuss the retroactive nature of the holdings in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000)(hereinafter referred to as "*Apprendi*"), Blakely v.Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)(hereinafter referred to as "*Blakely*") and United States v. Booker, 543 U.S. 220,125 S.Ct. 738, 160 L.Ed.2d 621(2005)(hereinafter referred to as "*Booker*"), the ongoing

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[1] This brief was authored in its entirety by counsel listed on the cover, and no counsel for a party authored this brief, in whole or in part. No person or entity related to either party to the underlying case made a monetary contribution to the preparation or submission of this brief. The consents of the parties to the filing of this brief are being filed herewith.

and irreparable burden created if these holdings are not viewed in light of the well-established rules in Yates v. Aiken, 484 U.S. 211,108 S.Ct 534, 98 L.Ed.2d 546 (1988) and Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 344, 109 S.Ct. 1060 (1989), and the need for prompt review of the question presented by the petition.

Of particular importance to Mr. Ratliff are constitutional protections for a criminal defendant enumerated in the Fifth Amendment, the Sixth Amendment, and the Fourteenth Amendment to the Constitution of the United States, and specifically the centuries' old civic value of the inviolate role of the jury in the determination, beyond all reasonable doubt, of all elements of a criminal charge.

INTRODUCTION AND SUMMARY OF ARGUMENT

The key constitutional principles enumerated in *Apprendi, Blakely, and Booker*, together with their respective progeny, are traditional principles of the common law of criminal jurisprudence. While the introduction of indeterminate sentencing schemes in the 1980s, a process originally sanctioned by this Court, was seen as an idyllic power sharing process among the three branches of government, the implementation and periodic modifications of the sentencing scheme have shown it to be an imperfect, imbalanced, and unconstitutional vehicle representing a power assertion by the legislative branch over the judiciary and a restriction in constitutional protections for an accused.

Now that the key Fifth and Sixth Amendment protection have been reasserted by this Court in *Apprendi, Blakely, and Booker*, due process requires a specific holding by the

Supreme Court that these principles are available for retroactive application on collateral review. Though Justice O'Connor specifically suggested as much in her dissent in *Blakely*, the clarity required under the statutes for retroactive collateral application of these holdings of substantive due process must come from the majority of the Court. The established rules for determining retroactive application, as permitted in Teague and mandated under Yates, indicate that the holdings of *Apprendi, Blakely, and Booker* should be retroactively applied. Due process requires such retroactive application. Now it is simply the time for the Court to conform its rules to the Congressional prerequisite for collateral retroactive application: specifically that the *Blakely* holding represents a reasserted rule of substantive constitutional law, made retroactive to cases on collateral review by the Supreme Court.

While the predominant question in the underlying matter may on its face appear to be whether *Blakely* impacts the imposition of consecutive or concurrent sentences, the greater questions are the ones certified to the court as being presented: (1) Is the holding in *Blakely* a new rule, or is it dictated by the holding of *Apprendi*? And (2) If *Blakely* is, a new rule is its holding retroactive?

In light of these questions, the lower courts are inconsistently and illogically opining that the *Apprendi, Blakely, Booker* principles are important, substantive due process statements . . . but just not for collateral application. In other words, the Ninth Circuit has opined that constitutional fidelity is a matter of timing and not universal application. Many other defendants, from all the judicial circuits, have been similarly addressed. Through this brief and others, this Court is asked for consistency in application, fidelity to constitutional principles, and loyalty to the core

values of over two hundred years of constitutionally protected criminal jurisprudence.

ARGUMENT

Criminal jurisprudence under the Constitution of the United States stands on certain principles understood to be communally guaranteed by our social compact in light of the excesses experienced by our forefathers under King George III and his Parliament. These principles include Sixth Amendment guaranties to a "speedy and public trial, by an impartial jury," and "to be informed of the nature and cause of the accusation." Against the common law pillar that guilt can only flow from a unanimous determination by a jury beyond a reasonable doubt, it is the jury, and its operating principles of the Fifth and Sixth Amendments, that have established our enviable philosophy and practice of criminal law.

Over the past half-decade, the American judiciary has grappled with the modern effects of sentencing guidelines, as well as the imposition of such guidelines on the pillar principles of constitutional criminal law. Perhaps one of the reasons for the judicial challenges was the inclusion in the modern Federal sentencing guidelines of the concepts that sentencing factors, factors that could increase a sentence, were to be determined by the sentencing judge based on the reduced standard of proof of a preponderance of the evidence. See, U.S.S.G. Chapter 1, Part A, introduction, comment (2) and (4)(a).

When Congress first established the current sentencing guidelines, this Court held the guidelines to be constitutional based upon a separation of powers discussion. In Mistretta v. United States, 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d

714 (1989), the Court first reviewed the constitutionality and propriety of the federal sentencing guidelines as proposed in the Sentencing Reform Act of 1984. Ultimately, Justice Blackmun, writing for all of the justices except for Justice Scalia who presciently dissented, opined that the subject of criminal punishments was one not constitutionally mandated to any one of the branches of government. Instead, it was noted, Congress had moved toward a "three-way sharing" of sentencing responsibility. Under the indeterminate-sentence system created in 1984, Congress defined the maximum punishments for certain crimes, the judge imposed a sentence within the statutory range, and the Executive Branch's parole official eventually determined the actual duration of imprisonment. See, Williams v. New York, 337 U.S. 241, 248 (1949). See also Geraghty v. United States Parole Comm'n, 719 F. 2d 1199, 1211 (3rd Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); United States v. Addonizio, 442 U.S. 178, 190 (1979); United States v. Brown, 381 U.S. 437, 443, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965) ("[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.") It was based upon this balanced approach and respect for the separation of powers that the Court held the guidelines constitutional. Matters now though have changed.

Over the past several years, Congress has moved past this balanced approach of sharing responsibility. Ultimately now, Congress has taken over the judiciary's role in the sharing of delegated authority in determining punishments for crimes.

(For example, in adopting the so-called Feeney Amendment, Congress has chilled the freedom of federal judges to impose sentences deemed appropriate. Under the Feeney Amendment, the reporting provisions of 28 U.S.C.

§ 994(w) were modified in that the Chief Judge in each district *must* submit to the Sentencing Commission "a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include the presentence report." 28 U.S.C. §994(w)(1). Furthermore, 28 U.S.C. § 994(w)(2) provides that the Sentencing Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports. With such legislation, no Federal judge can impose a sentence above or below the Congressional "guidelines" without imposing serious review by what was a coequal branch of the Federal government. This chilling legislation of a free judiciary has moved the Sentencing Guidelines from being a constitutional exercise of governmental goals to an unconstitutional aggregation of power in only one branch.)

Consequently, these mandatorily applied guidelines were confirmed to be unconstitutional as applied by this Court in *Booker*. This fact, that the federal sentencing guidelines were unconstitutionally permitting defendants to be sentenced far in excess of the actual crime charged or admitted to, has been clear, although largely ignored, throughout several opinions of this Court. *See generally*, Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court's pronouncement in *Booker* can no longer be ignored. Rather than correcting the constitutional problem on a piecemeal basis, the criminal justice system requires systemic correction, both prospectively and retroactively.

Fairness and integrity require the retroactive application of the principles outlined in *Apprendi, Blakely, and Booker*. In fact, so does this Court's own precedents. And the effect, as reflected in the Appendix, would be material.

APPRENDI, BLAKELY AND BOOKER HOLDINGS MEET THE STANDARD FOR RETROACTIVITY

Two prior cases of this Court establish the standard for retroactivity and whether *Apprendi, Blakely*, and *Booker* meet the standard. In Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 344, 109 S.Ct. 1060 (1989), this Court generally prohibited retroactive application of new procedural rules for cases on collateral review. Given with the nature of their holdings, though, many courts have wrestled with the Teague analysis to determine whether *Apprendi, Blakely*, or *Booker* are new procedural rule that should be applied retroactively. See, Morris v. United States, 2004 WL 1944014 (C.D. Ill. Sep 01, 2004), United States v. Okai, 2005 WL 2042301 (D. Neb. Aug. 22, 2005) and Garcia v. United States, 2004 U.S. Dist. LEXIS 14984 (NDNY Aug. 4, 2004) However, at the last step of most Teague retroactivity analysis, logic falls prey to a common mistake of suggesting that the Supreme Court's decision in Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 (2004) conclusively foreclosed the issue. In Schiro, though, this Court was only concerned with the retroactive application of the procedural right to a jury. [2]

In her dissent in *Blakely*, Justice O'Connor noted that "all criminal sentences imposed under the federal and state

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[2] And in any case, the majority's analysis was limited to the Ring rule.

guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack" because of the Court's decision in Teague. In Teague, the Court noted that new rules of constitutional procedure would apply if the new rule involves "those procedures that are implicit in the concept of ordered liberty." Teague, 489 U.S. at 311. Such rules vindicate two discreet concerns: the fundamental fairness of the underlying procedure; and the accuracy of that underlying proceeding. Saffle v. Parks, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). As this Court has held, a trial court's misallocation of fact finding responsibility (judge versus jury) does not warrant retroactive application, Schriro, 124 S. Ct. at 2523, the same cannot be said for the retroactivity of application of a preponderance of evidence standard as opposed to a reasonable doubt standard. See Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct.339, 53 L.Ed.2d 306 (1977) (giving retroactive effect to rule requiring proof of all elements of crime beyond a reasonable doubt and voiding presumptions that shift the burden of proof to defendant). Application of a lower standard of proof may be an error that significantly affects factfinding accuracy and undermines society's confidence in the result of the trial. See Schiro, 128 S. Ct. at 2523. In effect, it addresses a substantive right and not simply one of process.

This interplay of Teague and the issues raised by *Apprendi-Blakely-Blooker* cannot be understated. Based on a selective reading of Teague and limited prior Court decisions, lower courts have opined that the holdings of *Apprendi-Blakely-Booker* represent rules procedural in nature and therefore "new" rules for purpose of retroactivity. See, United States v. Gentry, 432 F.3d 600, 603 (5th Cir. 2005)("The Booker rule merely reallocates decision-making authority...It is concerned with the identity of the decision-maker and the amount of evidence required for a

sentence. . .Therefore the Booker rule is procedural in nature.") **This type of holding, replete throughout the circuits now, conflicts directly with this Court's prior pronouncement that determinations of burden of proof and presumptions of who carries such burdens are substantive rules to be retroactively applied.** See, Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct.339, 53 L.Ed.2d 306 (1977)

As indicated then, the complex analysis of Teague does not have to be applied. In Yates v. Aiken, the Supreme Court had the opportunity to review when new rulings should be made applicable to cases on collateral review. In reaching its conclusion, this Court looked to a prior decision of the Court to distinguish between new rules of law and new applications of already well established principles. The Yates court looked to the opinion of Justice Harlan in Desist v. United States, 394 U.S. 244, 89 S.Ct 1030, 22 L.Ed.2d 248 (1969), where Justice Harlan stated,

> The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very

> difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." 89 S.Ct., at 1041.

The Yates Court recognized that this distinction between new rules, and the application of old rules to new situations, was well settled.

> We stated in United States v. Johnson, 457 U.S. 537, 549, 102 S.Ct. 2579, 2586, 73 L.Ed.2d 202 (1982): "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. **In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."** (*emphasis added*) See also Truesdale v. Aiken, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987) (per curiam); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Lee v. Missouri, 439 U.S. 461, 462, 99 S.Ct. 710, 711, 58 L.Ed.2d 736 (1979) (per curiam)." Yates at 215, fn 3.

That defendants have a due process right to be sentenced according to accurate information, and found guilty of every element of the offense beyond a reasonable doubt, is a well established, longstanding principle of our system of justice. In *Booker*, Justice Stevens wrote,

> It has been settled throughout our history that the Constitution protects every criminal defendant 'against

> conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

Booker, at 747

For reasons explained in Jones, Apprendi, and Ring, the requirements of the Sixth Amendment are and have been clear.

As this Court further recognized in *Booker* and *Blakely*, while in some cases jury fact-finding may impair the most expedient and efficient sentencing of defendants, the interest in fairness and reliability protected by the right to a jury trial--a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment--has always outweighed the interest in concluding trials swiftly. *Blakely*, at 2542- 43. As Blackstone put it: "[H]owever convenient these [new methods of trial] may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though

begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns." 4 Commentaries on the Laws of England 343-344 (1769). See, *Booker* at 755.

As acknowledged by Justice Stevens, the right to be accurately sentenced and found guilty of each element of the offense has been well established for centuries. It is not a new rule. And it is a substantive rule of law. Even in the late 18th century, the Fifth and Sixth Amendments were but "recent" guarantees of these long established rights. To artificially block the retroactivity of these constitutional principles is to deny bedrock principles of our centuries-old criminal justice system to individuals as diverse as those referenced in the Appendix.

Under the backdrop of this historical precedent which even predates Blackstone, it is clear that the rule established by *Apprendi, Booker, and Blakely* must be retroactively applied on collateral review to every defendant unconstitutionally sentenced under the federal sentencing guidelines.

Society has long recognized a necessary link between punishment and crime. Harris, 122 S.Ct. at 2424 (Thomas, J., dissenting), citing *Apprendi* ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime"). "Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act?" Harris, 122 S.Ct. at 2424 (Thomas, J., dissenting).

If a statute annexes a higher degree of punishment based on certain circumstances, exposing a defendant to that higher degree of punishment requires that those circumstances be charged in the indictment and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 480, quoting J. Archbold, Pleading and Evidence in Criminal Cases 51 (15th ed. 1862).

As this courageous Court saw in *Booker*, the sentencing guidelines cannot supersede the United States Constitution. The guidelines should not be used to accomplish an "end-run" around the fundamental right to trial by a jury and to usurp the role of the jury. If the jury finds a defendant guilty of a range of drug amounts that could be as low as five kilograms, the district court should not be permitted to use the sentencing guidelines to ignore that verdict, take the jury's role, find responsibility for a higher drug amount, and punish based upon that extra-jury determination at a standard lower than proof beyond a reasonable doubt. See Anderson v. Fuller, 455 U.S. 1028, 1032, 102 S.Ct. 1734 (1982) (Burger, C. J., dissenting) (noting that federal courts should not usurp the function of a jury in finding facts).

This Court's prior decisions in *Apprendi*, *Blakely*, and *Booker* did not expressly announce retroactivity; however, the significance of the holdings combined with the Court's decision in Yates and Teague, showed that the rulings must be retroactive to cases on collateral review. Should this court fail to apply the rule issued in *Blakely* retroactively, an *ex post facto* violation will have been committed. An ex post facto law is one that "makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action, or that *aggravates* a *crime*, or makes it *greater* than it was, when committed." Bouie v. City of Columbia, 378 U.S. 347, 353, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)(emphasis in original). The Federal Constitution

specifically bars Congress from adopting any *ex post facto* laws. U.S. Const. Art. I §9, Cl. 3. If this court fails to apply the *Blakely* decision retroactively, but only prospectively, an *ex post facto* violation will have occurred. An accused's crime, for which collateral relief is sought, will have been aggravated from the time that it was committed.

In *Apprendi*, and its progency, the strength of our constitutional system was reaffirmed. This Court recognized the fundamental defects that had evoleved in our justice system due to the mandatory sentencing guidelines and its inherent punishment enhancements. Now is the time to complete this affirmation.

Though allowing prior cases, against which these defects have applied, to remain unchecked and uncorrected would be efficient, it would not be right. To bar the retroactive correction on collateral review of an unconstitutional process, when such defendants raised the error on direct appeal and yet were ignored, would be hypocrisy. And what does this Court then say to the descendants of our common forefathers? Yes, our system was applied incorrectly. We will do better in the future. To those who have suffered from these unconstitutional applications, fret not. It is only time, your time and lives, that are affected. And, of course, our integrity and fidelity to our inherent principles remain questioned.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

Robert A. Ratliff, Esq.
Law Offices of Robert A. Ratliff
713 Dauphin Street
Mobile, Alabama 36602
(251) 438-2250

Dated: August 24, 2006

APPENDIX

CASE EXAMPLES

United States v. Crishone Crystal Johnson
United States District Court
for the Western District of Virginia
Case Number 5:96-00022-01

In this cocaine conspiracy case, the defendant was found guilty on all five counts of her indictment after a plea of not guilty. A 39-year-old African American mother of one, and first time nonviolent offender, Defendant Johnson is serving a twenty-year sentence imposed in 1997 against her, a sentence determined based upon the judicial determination of drug quantity and of other enhancements.

The drug quantity in Defendant Johnson's case was determined by the United States Probation Officer who prepared her Presentence Investigation Report. He testified in open court, but only before the judge, how he calculated the drug quantity, a calculation determined from his judgment after listening to the witnesses in the case testify before the jury. Not only did the jury not calculate the drug quantity, the fact that would determine the extent of incarceration, but the judge did not even make an independent determination. In this case, the judge determined drug quantity based upon hearsay testimony of the probation officer! Further, the standard of proving this determination was the preponderance of evidence and not the burden of beyond a reasonable doubt.

After the *Booker* findings by this Court, it is clear that Defendant Johnson's sentencing violated her constitutional right to be tried by a jury of her peers, to have each and every element impacting incarceration determined by that jury, and for that jury to base its decision on the strict standard of beyond a reasonable doubt. Such a substantive due process protection did not occur. If it had, it is very likely that her sentence would have been substantially less than the two decades' time of incarceration received.

In recognizing this shortfall, Presiding Judge James H. Michael, Jr. lamented at sentencing:

> I'll tell you I agree with you, but it doesn't make any difference because I can't deviate from these guidelines under the Congressional instructions. As far as departing downward is concerned, I can tell you right now that if I did it in this case, it would be reversed and sent back to me. I have departed downward perhaps five times, four times . . . in 10 or 12 years or since the guidelines came into effect. Every blessed time, I have been reversed and the case sent back for resentencing. In other words, the Court of Appeals in this and other circuits have said to the District Courts, you all abide by the guidelines, period. Otherwise, you're going to be resentencing. If you have been looking at those cases, you'll see the same thing I see.

Clearly, Judge Michael believed, and from prior appellate review knew, that the unconstitutional guidelines were improperly required to be applied, by rote, with no discretion from the sentencing judge. To exercise his constitutional authority as judge would lead to reversal, at the very least. This recognition is reversible error in and of itself, as

imposition of an unconstitutional sentencing structure undermines the very substantive due process required for any constitutional criminal proceeding. Correction of these circumstances, while requiring retroactive application of *Blakely* and *Booker* in collateral proceedings corrects this error in our substantive due process.

United States v. Mary Catherine Ritcherson
United States District Court
for the Southern District of Iowa
Case Number 90-9-2

One of two defendants in a drug conspiracy case, Defendant Ritcherson, a 45-year African American mother of one was convicted on a one count indictment against her for conspiracy to distribute heroin, cocaine, and cocaine base. The United States District Court for the Southern District of Iowa imposed a sentence of 360 months, five years of supervised release, and a $20,000.00 fine, a sentence determined based upon the judicial determination of drug type, quantity, and of other enhancements.

The drug type and quantity in Defendant Ritcherson's case was determined by the United States Probation Officer who prepared her Presentence Investigation Report. He calculated drug quantity based upon converting cash seized to drug grams, assuming drug type, all being determined from his judgment after listening to the witnesses in the case testify before the jury. Not only did the jury not calculate the drug quantity, or determine the drug type, the facts that would determine the extent of incarceration, but the judge did not even make an independent determination. Further, the standard of proving this determination was the preponderance of evidence and not the burden of beyond a reasonable doubt.

Judge Charles Wolle at sentencing offered to receive any evidence that would impact sentencing; however, he maintained that the information contained in the presentence investigation report stood as a rebuttable presumption, subject only to being challenged based on evidence in the record from trial and additional evidence at sentencing. *See*, page 15, Sentencing Transcript. Then, using the standard of the preponderance of the evidence, the judge accepted the conversion methodology of cash into heroin, as offered but challenged, by the presentence report.

After the *Booker* findings by this Court, it is clear that Defendant Ritcherson's sentencing violated her constitutional right to be tried by a jury of her peers, to have each and every element impacting incarceration determined by that jury, and for that jury to base its decision on the strict standard of beyond a reasonable doubt. Such a substantive due process protection did not occur. If it had, it is very likely that her sentence would have been substantially less than the three decades' time of incarceration received.

United States v. Bernard Barnett
United States District Court
for the Southern District of New York
Case Number S5-90-CR-913(06)

The Defendant, Bernard Barnett, a married African American and father of three, was charged as a co-conspirator to an extensive conspiracy to possess heroin, crack, and cocaine, with an intent to distribute such drugs. He was 39 years of age at sentencing. Mr. Barnett was also charged with possession, with an intent to distribute, crack cocaine and heroin, as well as maintaining a place for narcotics distribution. In addition, this defendant was charged with

possessing a weapon in relation to a drug trafficking crime and possessing a weapon by a convicted felon.

Defendant Barnett was found guilty by a jury of these counts on December 6, 1991. Since his sentencing on August 13, 1992, he has been serving a life term, imposed by the United States District Court based upon the then prevailing recognition of a mandatory nature of the federal sentencing guidelines under the Sentencing Reform Act of 1984. See, page 15, Sentencing Transcript. This sentence represents the top of the Guidelines range. It also represents a sentence which exceeds the statutory maximum to be imposed on individuals who are career offenders as such individuals are defined under U.S.S.G. 4B1.1. See, United States v. LaBonte, 520 U.S. 751, 137 L.Ed.2d 1001, 117 S.Ct. 1673 (1997).

Using a high standard but relying solely on the decision of the judge, Mr. Barnett's sentence was enhanced and determined by a judicial application of 21 U.S.C. 841(b)(1)(A), a process that under Apprendi, Booker, and Blakely must be reserved to the jury. In addition, the calculation of drug quantity, determined and applied by the judge alone, exceeds the judicial role and obviates the role of the jury, as discussed in Blakely. In fact, the defendant was convicted on a general jury verdict after the presiding judge informed the jury that drug type and quantity was irrelevant for a jury determination. However, the count of offense references different types of drugs. Without a jury determination as to type and quantity, especially after conflicting testimony was given as to such matters, the substantive due process issues raised in Blakely arise in this case to taint the entire conviction and sentence.

From the tone and tenor of the transcripts, it is clear that Judge David Edelstein, the sentencing judge, did not care much for Defendant Barnett. His imposition a life sentence was, the judge declared, to be an important statement given the defendant's acts, character, and history. Nevertheless, how Mr. Barnett is convicted and sentenced is as important as whether he is so convicted and sentenced. Under *Blakely*, Mr. Barnett's sentence would need to be revisited so that his criminal proceedings were based in constitutional due process.

Per Curiam

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SUPREME COURT OF THE UNITED STATES

No. 05–9222

LONNIE LEE BURTON, PETITIONER *v.* BELINDA STEWART, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 9, 2007]

PER CURIAM.

We granted certiorari in this case, 547 U. S. ___ (2006), to determine whether our decision in *Blakely* v. *Washington*, 542 U. S. 296 (2004), announced a new rule and, if so, whether it applies retroactively on collateral review. We do not answer these questions, however, because petitioner—a state prisoner seeking postconviction relief from the federal courts—failed to comply with the gatekeeping requirements of 28 U. S. C. §2244(b). That failure deprived the District Court of jurisdiction to hear his claims. Accordingly, we vacate the judgment of the Court of Appeals and remand with instructions to direct the District Court to dismiss petitioner's habeas corpus application for lack of jurisdiction.

I

On October 31, 1994, a Washington jury convicted petitioner Lonnie Burton of rape, robbery, and burglary. App. 3–4. The state trial court initially entered judgment and sentence on December 19, 1994 (1994 judgment). In that judgment, the court sentenced Burton to a total of 562

months in prison. *State* v. *Burton*, No. 35747–6–I etc., 1997 WL 306429, *12 (Wash. App., June 9, 1997). The trial court rested the 562-month sentence on two alternative grounds under Washington's determinate sentencing scheme. First, it sentenced Burton to within-guidelines sentences for each offense—153 months for robbery, 105 months for burglary, and 304 months for rape—and directed that the sentences be served consecutively, for a total term of 562 months. *Id.*, at *13. Under Washington's "multiple offense policy," imposition of consecutive sentences constitutes an "exceptional" sentence, Wash. Rev. Code §§9.94A.120(18), 9.94A.400(1)(a) (2000),[1] but the trial court justified such a sentence on the ground that running the three terms concurrently would result in a sentence "clearly too lenient" in light of the purposes of Washington's sentencing scheme. See §9.94A.390(2)(i).[2] The second basis on which the court calculated a 562-month term was by running the sentences concurrently but imposing an exceptional sentence of 562 months solely for the rape conviction—again on the ground that the total sentence would otherwise be "clearly too lenient." *State* v. *Burton*, 1997 WL 306429, at *13.

After an unrelated prior conviction was overturned, Burton requested resentencing. Accordingly, over a year after the 1994 judgment, the trial court entered an amended judgment and sentence (1996 judgment), which, after recalculating Burton's offender scores, imposed a new sentence that relied solely on an exceptional 562-month sentence for the rape conviction, run concurrently

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[1] As we noted in *Blakely* v. *Washington*, 542 U. S. 296, 298, n. 1 (2004), Washington has since amended and recodified its criminal code. Citations are to provisions in effect at the time of Burton's sentencing.

[2] Specifically, the standard range sentences for rape, robbery, and burglary, if run concurrently, would have punished Burton as if he had committed only the rape. *State* v. *Burton*, No. 35747–6–I etc., 1997 WL 306429, *11–*12 (Wash. App., June 9, 1997).

with the other two terms. *Ibid.*; App. 45. On direct review, the Washington Court of Appeals upheld Burton's conviction, *State* v. *Burton*, *supra*, a decision the Washington Supreme Court declined to review, *State* v. *Burton*, 133 Wash. 2d 1025, 950 P. 2d 475 (1997), cert. denied, 523 U. S. 1082 (1998). The State Court of Appeals remanded for resentencing, however, because the trial court's exclusive reliance on the exceptional rape sentence decreased Burton's potential early release credits, raising vindictiveness concerns. *State* v. *Burton*, 1997 WL 306429, at *14.

In response, on March 16, 1998, the trial court entered a second amended judgment and sentence (1998 judgment). App. 3. In this judgment, the trial court recited the jury's 1994 guilty verdicts, *id.*, at 3–4, and again imposed a 562-month sentence, reverting to its original basis for doing so—running the three within-guidelines sentences consecutively. *Id.*, at 7, 29–32. Burton sought review of this sentence, but the Washington courts eventually rejected his challenges both on direct review and in state postconviction proceedings. *Id.*, at 43–55; App. to Brief for Petitioner 1a–4a.

On December 28, 1998, while state review of his sentence was still pending, Burton filed a petition under 28 U. S. C. §2254 for a writ of habeas corpus in the United States District Court for the Western District of Washington (1998 petition). App. 34. The standard form he filled out warned applicants that they must "ordinarily first exhaust . . . available state court remedies as to each ground on which" they sought "action by the federal court," or run the risk of being "barred from presenting additional grounds at a later date." *Id.*, at 37–38. Burton nonetheless challenged his custody only by disputing the constitutionality of his three convictions, not by pressing any sentencing claims. Where the form requested the "[d]ate of judgment of conviction," Burton listed "Dec. 16, 1994," corresponding roughly to the date of the 1994

judgment. *Id.*, at 34. The form asked whether the applicant had "any petition or appeal now pending in any court, either state or federal, *as to the judgment under attack*," to which Burton answered "Yes," explaining that "[the] sentence I received at resentencing is on direct appeal." *Id.*, at 40 (emphasis added). The District Court denied relief, *id.*, at 42, and the United States Court of Appeals for the Ninth Circuit affirmed, *Burton* v. *Walter*, 21 Fed. Appx. 632 (2001), cert. denied, 535 U. S. 1060 (2002).

Over three years subsequent to filing the 1998 petition, after the Washington courts had rejected his sentencing challenges, Burton filed another federal habeas petition (2002 petition), again in the Western District of Washington. This time, Burton claimed to be contesting the 1998 judgment, and challenged only the constitutionality of his sentence. In particular, he alleged that it violated our decision in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), to the extent the sentencing court departed from a standard sentence based on its own factual determinations. The District Court again denied the petition, App. 77, and the Ninth Circuit again affirmed, *Burton* v. *Waddington*, 142 Fed. Appx. 297 (2005). Both courts rejected the State's contention that the District Court lacked jurisdiction to entertain the petition because Burton had not obtained an order from the Court of Appeals authorizing him to file a "second or successive" habeas petition, as required by the habeas gatekeeping provisions, 28 U. S. C. §2244(b)(3). On the merits, the Ninth Circuit rejected Burton's *Apprendi* claim and agreed with the State that Burton could not benefit from *Blakely* v. *Washington*, 542 U. S. 296, because that decision announced a new rule that did not apply retroactively to Burton's sentence. 142 Fed. Appx., at 299.

It is this petition, the 2002 petition, that is before us today. We conclude, though, that because the 2002 petition is a "second or successive" petition that Burton did

not seek or obtain authorization to file in the District Court, the District Court never had jurisdiction to consider it in the first place.

II

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a stringent set of procedures that a prisoner "in custody pursuant to the judgment of a State court," 28 U. S. C. §2254(a), must follow if he wishes to file a "second or successive" habeas corpus application challenging that custody, §2244(b)(1). In pertinent part, before filing the application in the district court, a prisoner "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." §2244(b)(3)(A). A three-judge panel of the court of appeals may authorize the filing of the second or successive application only if it presents a claim not previously raised that satisfies one of the two grounds articulated in §2244(b)(2). §2244(b)(3)(C); *Gonzalez* v. *Crosby*, 545 U. S. 524, 529–530 (2005); see also *Felker* v. *Turpin*, 518 U. S. 651, 656–657, 664 (1996).

Burton's 2002 petition was a "second or successive" habeas application for which he did not seek, much less obtain, authorization to file. When Burton filed his first petition, the 1998 petition, he was being held in custody pursuant to the 1998 judgment, which had been entered some nine months earlier. When he filed his second petition, the 2002 petition, he was still being held in custody pursuant to the same 1998 judgment. In short, Burton twice brought claims contesting the same custody imposed by the same judgment of a state court. As a result, under AEDPA, he was required to receive authorization from the Court of Appeals before filing his second challenge. Because he did not do so, the District Court was without jurisdiction to entertain it.

The Ninth Circuit determined that the 2002 petition

was not "second or successive" because, under *McCleskey* v. *Zant*, 499 U. S. 467 (1991), Burton had a "legitimate excuse for failing to raise" his sentencing challenges in the 1998 petition. 142 Fed. Appx., at 299 (quoting *McCleskey*, *supra*, at 490; internal quotation marks omitted). Specifically, the Ninth Circuit reasoned that because Burton had not exhausted his sentencing claims in state court when he filed the 1998 petition, "they were not ripe for federal habeas review" at that time. 142 Fed. Appx., at 298.

We assume for purposes of this case, without deciding, that the Ninth Circuit's "legitimate excuse" approach to determining whether a petition is "second or successive" is correct. That court's ruling that Burton had a "legitimate excuse," however, is inconsistent with the precise practice we have explained governs in circumstances such as Burton's. The plurality opinion in *Rose* v. *Lundy*, 455 U. S. 509, 520–522 (1982), stated that district courts should dismiss "mixed petitions"—those with exhausted and unexhausted claims—and that petitioners with such petitions have two options. They may withdraw a mixed petition, exhaust the remaining claims, and return to district court with a fully exhausted petition. We have held that in such circumstances the later filed petition would not be "second or successive." *Slack* v. *McDaniel*, 529 U. S. 473, 485–486 (2000).

Alternatively, prisoners filing mixed petitions may proceed with only the exhausted claims, but doing so risks subjecting later petitions that raise new claims to rigorous procedural obstacles. *Lundy*, *supra*, at 520–521 (plurality opinion); see also *Slack*, *supra*, at 486–487. As noted, the form Burton used in filing his first petition warned of just that consequence. App. 37–38, *supra*, at 3. There is no basis in our cases for supposing, as the Ninth Circuit did, that a petitioner with unexhausted claims who chooses the second of these options—who elects to proceed to adjudication of his exhausted claims—may later assert that a

subsequent petition is not "second or successive" precisely because his new claims were unexhausted at the time he filed his first petition. This reasoning conflicts with both *Lundy* and §2244(b) and would allow prisoners to file separate habeas petitions in the not uncommon situation where a conviction is upheld but a sentence is reversed. Such a result would be inconsistent with both the exhaustion requirement, with its purpose of reducing "piecemeal litigation," *Duncan* v. *Walker*, 533 U. S. 167, 180 (2001), and AEDPA, with its goal of "streamlining federal habeas proceedings." *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005).

Burton directs us to two decisions, *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), and *Slack*, *supra*, in which we have not regarded subsequent petitions to be "second or successive." But these cases are readily distinguishable. In *Martinez-Villareal*, we held that the claim of a capital prisoner that he was insane and therefore could not be put to death was necessarily unripe until the State issued a warrant for his execution, and so the prisoner's subsequent request for consideration of that previously unripe claim was not "second or successive" for purposes of §2244(b). 523 U. S., at 644–645. But unlike Burton, the prisoner there had attempted to bring this claim in his initial habeas petition, prompting us to look to *Lundy* in concluding that the claim "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies," that is, characterizing it as not "second or successive." *Martinez-Villareal*, 523 U. S., at 644. Indeed, we expressly declined to address the situation where a petitioner fails to raise the claim in the initial petition. See *id.*, at 645, n. In this case, Burton did not raise the relevant claims in his 1998 petition. Without more, therefore, our holding in *Martinez-Villareal* does not support the conclusion that Burton's 2002 petition was not "second or successive."

Slack is equally unhelpful to Burton; that decision

merely confirmed that when a "first" petition is dismissed because it contains unexhausted claims, a prisoner returning later with a fully exhausted petition would not confront the "second or successive" bar. 529 U. S., at 485–486. We held that a "petition filed after a mixed petition has been dismissed under *Rose* v. *Lundy before the district court adjudicated any claims* is to be treated as 'any other first petition' and is not a second or successive petition." *Id.*, at 487 (emphasis added). See also *id.*, at 478 ("[A] habeas petition which is filed after an initial petition was dismissed *without adjudication on the merits* for failure to exhaust state remedies is not a 'second or successive' petition" (emphasis added)). Burton's case is quite different—his first petition was not subject to dismissal as containing unexhausted claims, and in fact was adjudicated on the merits.

Moving beyond the ground relied upon by the Ninth Circuit, Burton argues that his 1998 and 2002 petitions challenged different judgments. He notes that his 1998 petition identified the pertinent judgment as the 1994 judgment, App. 34, while the 2002 petition challenged the sentence imposed in the 1998 judgment. The 1998 judgment, however, had been entered nine months before Burton filed his first petition. That judgment, the same one challenged in the subsequent 2002 petition, was the judgment pursuant to which Burton was being detained. Unlike *In re Taylor*, 171 F. 3d 185 (CA4 1999), cited by Burton, there was no new judgment intervening between the two habeas petitions. In his 1998 petition, Burton specifically described his unexhausted sentencing claims as claims "as to the judgment under attack," App. 40, belying any notion that those claims arose from a judgment distinct from the one challenged in 1998.[3]

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[3]For the same reasons, Burton's reliance on *Castro* v. *United States*, 540 U. S. 375 (2003), is misplaced. That case reversed a lower court's

Burton finally contends that had he not filed the 1998 petition when he did, and instead waited until state review of his sentencing claims was complete, he risked losing the opportunity to challenge his conviction in federal court due to AEDPA's 1-year statute of limitations. See §2244(d)(1). But this argument misreads AEDPA, which states that the limitations period applicable to "a person in custody pursuant to the judgment of a State court" shall run from, as relevant here, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." §2244(d)(1)(A). "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U. S. 211, 212 (1937). Accordingly, Burton's limitations period did not begin until both his conviction *and* sentence "became final by the conclusion of direct review or the expiration of the time for seeking such review"—which occurred well *after* Burton filed his 1998 petition.

Burton argues in rebuttal that this reasoning would necessarily mean the District Court lacked jurisdiction to consider the 1998 petition, but he is mistaken. Section 2254(a) states that a district court "shall entertain" a habeas petition "in behalf of a person in custody pursuant to the judgment of a State court." When he filed the 1998 petition, Burton assuredly was "in custody pursuant to the judgment of a State court"—even if, at that point, the 1998 judgment was not final for purposes of triggering AEDPA's statute of limitations.

The long and short of it is that Burton neither sought

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recharacterization of a motion requesting a new trial pursuant to Federal Rule of Criminal Procedure 33 as a first habeas petition. Here Burton filed his first habeas petition as such in 1998; it involves no similar "recharacterization" to recognize that the judgment pursuant to which Burton was confined at the time was the same judgment that gave rise to the sentence later challenged in his second habeas petition.

nor received authorization from the Court of Appeals before filing his 2002 petition, a "second or successive" petition challenging his custody, and so the District Court was without jurisdiction to entertain it. The judgment of the Court of Appeals for the Ninth Circuit is therefore vacated, and the case is remanded with instructions to direct the District Court to dismiss the habeas petition for lack of jurisdiction.

It is so ordered.